

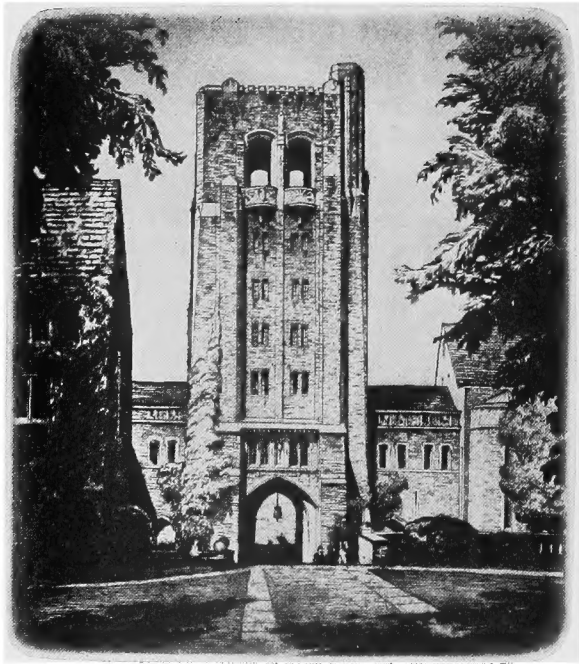
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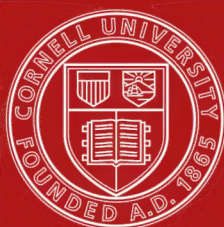
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THE LAW OF WILLS.

PART I.

ON EXTRINSIC EVIDENCE,

BY SIR JAMES WIGRAM,
LATE VICE CHANCELLOR.

PART II.

ON THE CONSTRUCTION OF WILLS,

BY JOHN P. O'HARA,
COUNSELLOR AT LAW.

A TREATISE
ON
EXTRINSIC EVIDENCE

IN AID OF THE
INTERPRETATION OF WILLS,

BY SIR JAMES WIGRAM,
LATE VICE CHANCELLOR.

WITH

EXTENSIVE ADDITIONS TO THE TEXT, AND COPIOUS REFERENCES
TO AMERICAN CASES,

BY JOHN P. O'HARA,
COUNSELLOR AT LAW.

SECOND AMERICAN, FROM THE LAST LONDON EDITION.

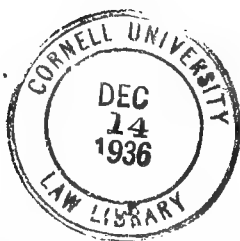
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GENERAL PREFACE.

THE construction of every document depends upon the terms used, and the parol evidence allowed by law to explain the meaning of those terms. The object of the first part of the following treatise is to show what internal evidence is, and when it may be successfully confronted by extrinsic proofs. Internal evidence, or construction, means the primary sense of the words used. This meaning of the terms always prevails, unless the language is thereby rendered inoperative. Even this result cannot be avoided in applying a will, if the difficulty relates to the words of disposition, the quantity of interest, or the meaning of an abstract term. Part I is intended to show, however, that an ambiguity may be explained by extrinsic evidence of the testator's circumstances, if the difficulty relates to the subject or object of gift, and results from inaccuracy of description; while even evidence of the testator's intention may be given, if the ambiguity is owing to equivocation and not wholly to inaccuracy; in other words, if the description suits two or more persons, or things. This edition of Sir James Wigram's work will, it is to be hoped, give an account of, or references to, most of the American cases materially affecting the application of extrinsic evidence in aid of the interpretation of wills.

The rules cited in Part I are essentially of a philosophic and even of a scientific nature. An author who covets perpetuity of fame may gain this by writing a good work on evidence, while a treatise upon any technical branch of law will enjoy as ephemeral a career, as the special doctrines or statutes on which it is founded. Cases decided contrary to the general principles relating to the admissibility of parol evidence in aid of the construction of wills, as described by Sir J. Wigram, are absolutely of no authority, unless so far as Sir J. Wigram himself may have deviated from first principles. Case-law under Part II is, on the contrary,

all important. If the question at issue is governed by a precedent, no reasoning on first principles will be listened to by the court. Rules of construction, therefore, are much more numerous than rules of the branch of evidence treated of in the first part of this work; and a knowledge of first principles without an intimate acquaintance with the leading testamentary cases, is of no avail in an argument on the construction of a will, as far as the internal evidence of its meaning is concerned.

The treatise on the construction of wills is an effort to give, free from all historical matter, and from cases either obsolete or of doubtful authority, the present rules adopted by the American tribunals for the interpretation of wills. The author feels much the disadvantage of going over the same ground that has been so ably mapped out by others. The law of wills, however, is undergoing change every day, and a recent compendious account of these alterations will perhaps be found not to be without its use.

Part II, therefore, of the subsequent work has been intended to contain in a compressed form all the leading rules of testamentary construction, together with the appropriate cases. These decisions are not, like the cases in Part I, mere examples or elucidations of certain *a priori* principles, but are themselves, as already stated, the ultimate guides for future investigation. Whether they are jurally sound or not, they are law, until reversed on appeal, or by the legislature. But, as regards Part I, no case is of any authority that deviates widely from first principles.

My obligations to Jarman are patent everywhere in this work. But they hardly need this extrinsic acknowledgment from me, especially as I so often refer to that main source of my information.

The indexes have been prepared with much regard to copiousness and appropriateness of reference.

INTRODUCTION.

RULES OF LAW, DISTINGUISHED FROM PRINCIPLES AND RULES OF CONSTRUCTION.

RULES of law differ from both principles of interpretation, and from rules of construction, inasmuch as rules of law relate to the incidents of property itself, and not to gifts or contracts. Thus the power of an adult male to alien property springs from a rule of law and cannot be defeated. The incidents of dower and curtesy to estates of inheritance also result from rules of law. These doctrines are founded on principles of public policy, and do not admit of being contravened by any private citizen.

Principles of construction are also founded upon a regard to public policy, and cannot be precluded by a testator. These principles are applicable, alike to every kind of limitation. They are thus distinguished from rules of construction, which relate only to particular doctrines of law, such as that any words of perpetuity in a will may pass a fee. Doctrines relating to parol evidence, or the liberal interpretation of a will, imply principles of construction. The maxim that the latter of two wholly inconsistent gifts in a will must prevail, seems also to be a principle of construction; since any previous intimation in the will to the contrary is necessarily disregarded by the testator. The *lex rei sitæ*, however, may be precluded by a testator provided he seeks not to infringe upon any rule of law of the *loci rei sitæ*.

To principles of construction also belong all *cy pres* doctrines, according to which words are transposed, altered, or expunged, in order to effectuate the testator's meaning.

But, rules of construction may be ignored by a testator, while they also apply only to particular limitations, and not to all. Thus the rule in *Shelley's case* is a rule of construction since it does

not apply to gifts for life. Such, too, is the rule *in Wild's case*; *in Archer's case*; *in Boraston's case*, &c. Jarman, indeed, considers that the rule in *Shelley's case* is a rule of law. It appears, however, to be neither a principle of interpretation (since it is not applicable to every kind of testamentary gift), nor a rule of law, since (unless Jarman's *petitio principii* is conceded), it may be defeated by a clear indication of intention on the part of the testator that it is not to apply.

Rules of law, rules of public policy, and *rationes judicandi* or principles of interpretation, are thus alone beyond the power of a testator to override by any declaration of his own intention. Rules of construction are entirely at his mercy. Therefore, there is not a single such rule commented on in the following pages that may not be precluded or overborne by the special text of a will.

Wills, nevertheless, are *ex post facto* as subject to rules of law and construction as deeds, only the rules are of a different kind, and are much more numerous, though analogous to rules of the common law. Conversely, intention is the key even to the construction of a deed, though this intention must be considered as subordinate to precedent, and the rules of interpretation established with respect to deeds, and the phrases as to which the maker of a deed, unlike a testator, has no choice.

It is desirable, indeed, that precedent, as distinguished from common law, should be strictly observed in the interpretation even of wills. For, where testamentary case-law is grossly wrong, it can be remedied by statute, and where it is at all reasonable, it both prevents many cases from being litigated, and also acts as a barrier against judicial aberration.

Rules of testamentary construction are necessarily more numerous than those that regulate contracts *inter vivos*. For, not only will the rules applicable to deeds prevail as to testamentary gifts, if there is nothing in the will to authorize a departure from those rules, but, in addition, the phrases governed by these rules, when accompanied by certain other forms of expression peculiar to wills, and common in these instruments, assume a new meaning; while, finally, various clauses are interpreted neither according to their grammatical nor technical signification, but in what may be called a testamentary sense, or *cy pres*.

INTRODUCTION.

The presumption that every one knows the law is conclusive as regards parties to deeds, but is only *prima facie* as respects testators, unless, indeed, we suppose that the law he is presumed to know is either testamentary case-law, or else the doctrine that the ordinary rules of law applicable to transactions *inter vivos*, do not strictly apply to the construction of wills.

The leading rules of testamentary construction, most of which also indicate inflexible principles of interpretation, may be briefly summarized as follows:—

1. Devises are construed by the *lex rei sitæ*;¹ bequests by the *lex domicilii*.² *Semble*, the application of these rules may be precluded by a direction in the will not infringing upon any rule of law of the *loci rei sitæ*; in other words, these doctrines are rules of construction, and not rules of law or principles of interpretation.

2. The intention of the testator is to be sought and followed, but subject to the limits prescribed by statute, principles of public policy and of interpretation, precedents, and established *rationes judicandi*.³

3. The testator's primary intention, subject to the qualifications hereinbefore mentioned, controls and modifies any disposition in the will inconsistent with such primary intention.⁴

4. The phraseology of the will is presumed to be in accordance with the rules of correct etymology,⁵ and of the common law, unless the will itself contains evidences of a contrary intention, by furnishing its own glossary,⁶ either explicitly or by an obvious peculiar use of words,⁷ so far as such use is not inconsistent with rules of public policy or law.

¹ 2 Jarm. 741; see, however, Story Conf. Laws, § 479 b; 2 Greenleaf on Ev. § 671.

² *Pempde v. Johnson*, 3 Ves. 198, Sumner's ed. and notes; *Kerr v. Moon*, 9 Wheat. 565; *Pötter v. Titcomb*, 22 Maine, 302, 303. For other cases elucidating these propositions still more completely, the reader is referred to the appropriate titles in the index and table of contents of Part II. The cases here cited are adduced only by way of general illustration.

³ 2 Jarm. 739; *Hawley v. Northampton*, 8 Mass. 3; *Morton v. Barrett*, 22 Maine, 257.

⁴ *Covenhoven v. Shaler*, 2 Paige, 122; *Walker v. Walker*, 17 Ala. 396.

⁵ 18 Ves. 466, Sumner's ed. notes.

⁶ Doug. 269.

⁷ *Ide v. Ide*, 5 Mass. 500; 2 Beav. 352; 2 Mer. 389.

5. The grammatical is the presumed sense of the terms used; but technical terms will be construed according to their technical signification, unless a contrary use of them by the testator is apparent in the will.¹

6. Every clause and word will, if possible, receive a meaning, even though this may modify the primary sense of other parts of the will.²

7. Every disposition will be sought to be effectuated, either wholly or at least in part.³

8. The maxim that a document may be incorporated in another by reference—*verba relata inesse videntur*—applies to wills, even though the extrinsic document is not executed as a will.⁴

9. Implication is not allowed, unless it is necessary or indispensable for a sensible effect being given to the context.⁵

10. Implication is not allowed to control an express disposition, if the clause is equally consonant to the testator's designs.⁶

11. An express and clear gift is not affected by the addition of ambiguous or false description or designation.⁷

12. If a certain clause or term is not made sensible by being transposed or altered, it will be deemed expunged.⁸

13. Of two wholly opposite and irreconcilable clauses, the latter will prevail, if both are equally relative to the testator's main intention.⁹

14. A void devise will not be rectified, except that, if legal in a secondary sense, it will be so interpreted, and executed *cy pres*.¹⁰

15. A manifest mis-writing, as "with issue" for "without issue," will be so interpreted; but no total blank can be

¹ Mowatt v. Carow, 7 Paige, 328; 2 Ball & B. 204.

² Jones v. Doe, 1 Scammon, 276; Lasher v. Lasher, 13 Barb. 106.

³ Leavens v. Butler, 8 Port. 380; Kane v. Astor, 5 Sand. 467.

⁴ See Nichols v. Lewis, 15 Conn. 137.

⁵ 8 Rep. 94; see Linstead v. Green, 2 Md. 82.

⁶ Chinn v. Respass, 1 Monr. 11.

⁷ Pratt v. Rice, 7 Cushing, 209.

⁸ Homer v. Shelton, 2 Met. 20.

⁹ Cook v. Holmes, 11 Mass. 528.

¹⁰ See Bartlett v. King, 12 Mass. 537.

supplied, nor will a term be altered unless with aid from the context.¹

16. The construction of a will is not to be moulded by events,² but by the language only, and as interpreted according to the rules of law, and with the appropriate extrinsic evidence.

17. A testator is presumed to expect that his will shall apply to the subjects and objects of his bounty at the time of his death, and consequently he is not supposed to provide for lapse or ademption, unless the will discloses an intention to that effect.³

18. A presumption exists in favor of common law and vested interests.⁴

19. An heir (and this doctrine is virtually applicable also to dowresses, tenants by the curtesy, next of kin, and all claiming by the *post* or act of law), is not to be deprived of his common law rights, except so far as such rights are absolutely inconsistent with the dispositions in the will. Gifts of property contrary to these rights are strictly construed, and, where the context is ambiguous, merely negative words exclude only rights under the will, and not those accruing by a common law devolution of property. *Seem*, a primary liability arising under a statute ought to be interpreted in the same way as if the burden was imposed by the common law.⁵

20. The rules relating to the construction and evidence of meaning of a will are the same in all courts, whether of law or equity, except that where equity in certain cases raises a presumption against the letter of the text, the court will, in such cases, permit parol evidence to be adduced both for and against such presumptions. At common law neither the presumption nor the parol evidence is admissible.⁶

21. A common law interest is never construed an equitable one exclusively. But, the testator's intention is the guide as to whether any particular gift is legal or equitable.⁷

¹ 8 Mod. 59.

² Cases Temp. Talbot, 21.

³ Montgomery v. Montgomery, 2 Irish Eq. 161.

⁴ Ferson v. Dodge, 23 Pick. 287; Dingley v. Dingley, 5 Mass. 535.

⁵ See, however *contra*, Mellish v. Vallins, 2 Jo. & H. 194.

⁶ See 1 Greenleaf on Ev. § 290, *et seq.*

⁷ See Richardson v. Noyes, 2 Mass. 26.

22. A will never passes seisin, or a right to the possession of land or chattels, until after the death of the testator. But the dispositions in the instrument may be moulded by reference to past, present, or future events.¹

It thus appears that the testator's intention must always be subject to rules 2, 3, 6, 7, 9, 15, 17, and to all the rules relating to the admissibility of parol evidence.

PAROL EVIDENCE.

23. Parol evidence is always admissible to apply the dispositions in a will in their primary sense to their appropriate subjects and objects.²

24. Parol evidence is thus used in respect to matter of practice, viz. : in applying a disposition according to the grammatical sense of the terms used.³

25. Parol evidence is never applied in aid of the interpretation, except when the primary meaning of the will or a part thereof is insensible or inapplicable to the state of facts to which it professes to relate,⁴ or else when an equitable presumption is raised against the letter of the will.

26. When the disposition is insensible according to the primary sense of its terms, parol evidence in aid of the construction is admissible of the testator's circumstances, but not of his intention, in order to effectuate the dispositions of the will in that secondary sense of the terms used which is nearest to their grammatical meaning,⁵ provided such sense is consistent with the testator's primary intentions.

27. Parol evidence of the kind just mentioned is admissible of the meaning of technical, unusual, or foreign phrases, as also of general, local, or trade customs of any kind, and likewise of the appellations used by the testator with respect to the subjects or objects of his bounty, when the will, according to the primary meaning of its phraseology, is insensible or ambiguous on these points.⁶

¹ *Gold v. Judson*, 21 Conn. 616.

² *Wooton v. Redd*, 12 Grat. Va. 196.

³ 1 Greenleaf on Ev. § 290.

⁴ *Brown v. Saltonstall*, 3 Met. 426; *Hand v. Hoffman*, 3 Halst. 78.

⁵ See 1 Story Eq. Jur. § 181.

⁶ *Grant v. Grant*, 39 L. J. R. N. S. 272; *Ryers v. Wheeler*, 22 Wend. 148.

28. Parol evidence is not receivable of the declarations of a testator, or to what he meant by the use of an abstract term, as "mod," child,¹ &c. ; but parol evidence in such cases is admissible of the testator's habits, and of the meaning commonly attached by him to such expressions. {The case is one of ambiguity, but not of equivocation. In other words, it is difficult to give the term any application. But there is no contest between two or more subjects or objects of a concrete nature.}

29. Parol evidence is not admissible to prove that a word of limitation was used as a term of purchase, or conversely,² or that a lapse was intended to be provided for.³

30. Parol evidence is admissible only to explain concrete and not abstract terms. But, it is admissible in respect to cumulative⁴ legacies, and legacies to creditors or debtors.⁵

31. Parol evidence is admissible to rebut any equitable presumption that is contrary to the grammatical meaning of the words in the will, such as the presumption against double or cumulative legacies.⁶

32. Parol evidence of intention is not admissible in questions of cumulative legacies,⁷ or to show that a legacy is charged on land.⁸ These fall under the third, and not the seventh, of Sir James Wigram's Propositions.

33. In other cases of equitable presumption—as of the satisfaction of a debt by a legacy—evidence of the testator's intention is admissible.⁹ In other words, the case falls under or belongs to the class governed by Proposition III, when the presumption is founded wholly on matter that is documentary, but the case is to be reckoned with those belonging to Proposition VII, when the presumption is partly founded on matter *dehors* the will such as ademption, satisfaction, payment, &c.

34. Parol evidence of the testator's intention or declarations may be adduced when these are part of the *res gestæ* under inquiry, as in a case of imputed fraud, accident or mistake, or in respect to the ademption or payment *inter vivos* of an intended gift,

¹ Goblet v. Beechey, App. No. 1, Part 1.

² Comfort v. Mather, 2 W. & S. 450.

³ Id.

⁴ Wilson v. O'Leary, 20 W. R. 28.

⁵ See Blond v. Blinkinbeard, 8 B. Mon. 397.

⁶ See 1 Greenleaf on Ev. 287, *et seq.*

⁷ Wilson v. O'Leary, 20 W. R. 28; Osborne v. Duke of Leeds, 5 Ves. 369.

⁸ Dey v. Dey, 4 C. E. Green. 137. ⁹ Wallace v. Pomfret, 11 Ves. 547.

or when the testamentary gift would be rendered uncertain and void by extrinsic circumstances, and would be incapable of being applied to any subject or object in particular, unless such evidence were adduced, while the gift as determined by the construction of the document alone is, in the abstract, imperative and accurate, both in respect to a subject and object of the testator's bounty.¹

35. In cases of accident and mistake, parol evidence of every kind is admissible to nullify a will or part thereof, but not to correct or reform it.²

36. In cases of fraud, a disposition may be either nullified or reformed, provided the author of the fraud took a benefit under the will, or otherwise profited by his deceit.³

It thus appears that the American testamentary code is essentially the same as that of England. The exceptions to this statement are mainly three: 1. The rule in Shelley's case is recognized only in some States, and even in these but to a limited extent. Any intimation of opinion to the contrary, such as existed in *Perrin v. Blake*,⁴ will be acted on by the court. The rule is thus here one of construction exclusively, and not of law. There is no likelihood that the American courts will deviate from this doctrine, which certainly has convenience to recommend it.

2. Charitable gifts are not executed *cy pres* in most of the States. But, as this negation of *cy pres* appears to have been founded on the erroneous assumption that the English Court of Chancery has no jurisdiction in respect of charitable gifts at common law, it is probable that with further light on this point, the bounds of the American rule will become ultimately coincident with the similar doctrines established by the equity decisions in England.

3. Trust powers, *semble*, are not as readily enforced here as in England.

These are the only important exceptions to the general English law of testaments. For, our law of parol evidence is daily approximating more and more to that of England, if we except only the rule in *Doe v. Hiscocks v. Hiscocks*.⁵

¹ *Den v. Bolick*, 1 Iredell, 244; *Tudor v. Terrel*, 2 Dana, 49.

² Part I, pp. 264, 280, *et seq.* ³ *Ib.* ⁴ 4 Burr. 2579. ⁵ M. & W. 363.

PREFACE TO PART I.

PAROL evidence is in all cases used to apply the dispositions in a document. The following treatise, therefore, relates to the use of parol evidence in aid of the construction, and not when the testimony is adduced to apply the gifts in question to their intended subjects or objects, according to the primary meaning of the terms employed. Much confusion is occasioned by the conflicting statements to be found in the reports to the effect that the court can put itself in the place of the testator, and that it cannot so place itself. It can always, however, do so for the purpose of applying the dispositions in a document according to the primary sense of the terms used. But, it is only in certain cases that it can be guided by the light of extrinsic evidence in aid or reformation of the construction, as distinguished from the application of the words according to their primary meaning. The subjoined work is concerned with discriminating those instances where parol evidence may be thus used in aid of the construction from those seemingly analogous cases where the evidence cannot be so applied.

Of the cases admitting of the use of parol evidence in aid of the construction, some are open only to proof of the testator's habits and usages, but not of his intention, although that is the sole object sought to be reached by all testamentary evidence. This boundary line is marked out by Propositions Three and Five. In other cases, the testator's declaration on the point in question may be directly proved. Proposition Seven defines when evidence of this nature may be given. Proposition One relates to construction, and not to evidence, and Propositions Two and Four are of a similar nature; since it is by force of a general rule of law, and not by means of evidence relating to a concrete subject or object, that a will is applied according to the primary sense of its terms, or that evidence is admissible to

determine the meaning of technical expressions, or of a usage trade. Proposition Six is but the negative converse of Propositions Three and Seven. These two last propositions really comprise the whole domain of the law of parol evidence in : of the construction of written documents. Still, the more extensive division adopted by Sir James Wigram, has its uses, and tends to throw light on the primary foci.

Of the philosophic excellence of Sir James Wigram's work there never has been any doubt. The treatise is also as practical as it is well composed, and contains a mine of information upon almost all branches of its subject matter. A *cas omisus*, indeed, occurs in it, with respect to equities and equitable presumptions. But this defect has been sought to be remedied in the present edition.¹

Sir James Wigram appears to have been of opinion² that parol evidence may be adduced to show the quantity of interest intended to be conferred on a beneficiary. This, however, can never be done directly, although the quantity of interest taken by a particular donee is often defined by reference to the interest given to another, as to whose rights parol evidence has been adduced. But, such a remote or indirect consequence of the adduction of parol evidence has no logical relation to the testimony in question. A thousand other results may ensue from the adduction of parol evidence, with which, nevertheless, all would admit that such ulterior consequences have no necessary connection. It may safely be asserted, therefore, that parol evidence can never be used to define the quantity of interest taken by a particular beneficiary, although the general evidence, if it throws light on this point, is not to be rejected on that account. The result in question still has no legal connection with the evidence.

Jarman³ and others state, in general terms, that parol evidence may be used to rebut the presumption of a resulting trust. It has been a leading object of the present edition to discriminate the resulting trusts which may be thus defeated from those which may not. For, parol evidence is never admissible to defeat a trust that results by construction of law. The presumptions that fall under Proposition Three are

¹ P. 264 *et seq.*

² Proposition V.

³ Vol. I, §57.

also distinguished from those which come under Proposition Seven, and admit of direct evidence of the testator's intention.

A case of election can never be raised by parol, although the contrary has been sometimes stated. An election, however, of course *may* be the result of the adduction of parol evidence under Proposition Three or Seven. But, as has been already stated with respect to the legal quantity of estate granted, an indirect consequence of evidence has no connection with the rules regulating its admissibility.

It is only with respect to a *concrete* subject or object that parol evidence can be at all adduced in aid of the construction, and it is only when the contest is between two or more such subjects or objects, all of which are described in the will with legal certainty, that direct evidence of the testator's intention can be given. The operation of these two rules may give a donee a leasehold and not a freehold, and may also put him to his election. But, no evidence can be adduced for the sole purpose of defining the interest intended to be given to him, or of showing that the testator *intended* him to do a certain act. The testator's intention can never be proved with respect to any act, but only for the purpose of identification, where the terms of the gift are equivocal.

The law of evidence is daily assuming a more consistent and philosophic form, both in England and the United States. In the former country it has nearly reached perfection. With us it is still somewhat nebulous, but tends constantly to conform to the analogous English rules. Our law of testamentary evidence resembles the English rules of the Eldon period. Contrary to the general tendencies of the courts of both nations, with respect to rules of law and of construction, the rules of evidence are, in the main, sought to be enforced more rigidly now than formerly. It is hard to pronounce an opinion upon a course which tends to shut out evidence. Still, it is doubtless better that the intended beneficiaries of a few testators should be disappointed rather than that all titles under wills should be open to endless litigation.

The decision in *ex parte* Hornby¹ shows that the doctrine

¹ 2 Brad. 420; *infra*, p. 167.

held in *Doe d. Hiscocks v. Hiscocks*¹ does not prevail in the American courts. If *any* part of the designation in the will is applicable with legal certainty to two or more persons or things, parol evidence will be received here of the testator's intention. This principle of interpretation seems to be sound, for, by eliminating the insensible portions, the remainder of the description is as much equivocal as if no part of it was inaccurate. With the exception of this extension of the scope of Proposition Seven, the American law of extrinsic evidence in aid of the interpretation of wills seems in most of the States to correspond exactly with the analogous code of England.

The present editor's additions to the text are comprised within brackets. The comments of the English editor are in the notes.

¹ 5 M. & W. 363.

PREFACE TO THE FOURTH EDITION.

I HAVE been entrusted by the distinguished author of the following pages with the duty of preparing a Fourth Edition for the press; the last—that of 1840—having been long since out of print.

The work itself has been cited with high and peculiar approbation in every branch of the Superior Courts of this kingdom, and has been referred to, as a conclusive authority, by the principal text-writers both in this country and in America. The Seven Propositions which it enunciates may be taken not only to embrace but to exhaust the theory of the Rules examined.

Unfortunately, the most entire assent to a canon of exposition in the abstract, by no means secures its just application to the facts of each particular case; and an undue degree of laxity in this latter respect may, it is conceived, be detected in certain of the reported decisions.

The calamity which so prematurely deprived the profession and the public of the services of Sir James Wigram as a judge, has, of course, prevented his revising the present edition. It was his wish that no portion of the original text should be displaced; and, therefore, with the fullest latitude kindly allowed me as to the introduction of new matter, either in the text or notes, I have felt it best, in spite of occasional inconvenience, to confine myself exclusively to the latter.

W. KNOX WIGRAM.

4 STONE BUILDINGS,
JUNE, 1858.

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SEVEN PROPOSITIONS APPLICABLE TO THE CONSTRUCTION OF WILLS

PROPOSITION I.—A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.....

PROPOSITION II.—Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.....

PROPOSITION III.—Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable.....

PROPOSITION IV.—Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the court of the proper meaning of the words

PROPOSITION V.—For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may

inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words..... 142

PROPOSITION VI.—Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (*except in certain special cases, see Prop. VII.*) will be void for uncertainty 175

PROPOSITION VII.—Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—courts of law, in certain special cases, admit extrinsic evidence *of intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (*i.e.* the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator..... 188

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ERRATA.

PART I.

Page 64, line 24, *for* "latter" *read* "former."

PART II.

Page 19, line 11, *for* "§ 18" *read* "§ 8."

" 160, line 3, *for* "§ 2" *read* "§ 1."

" 207, line 30, *for* "special" *read* "only."

" " line 30, *for* "cannot" *read* "may."



EXTRINSIC EVIDENCE

IN AID OF THE

INTERPRETATION OF WILLS.

[“I agree in the necessity of adhering to general rules in the construction of Wills and other instruments. It is expedient that such rules should be held sacred; because they withdraw the decision from the discretion of the individual judge, and prevent him from pursuing his own views of each particular case. And there is less inconvenience in the hardship which may sometimes be occasioned by a strict adherence to the rule, than in the confusion which must follow on departing from it.”—*Per Tindal, C. J.*, 7 Bing. 279.]

1. THE Statute of Frauds, which regulates the disposition of property by will, requires (except in certain cases specified in the statute) that the will shall be in writing.¹

¹ The Statute of Frauds, 29 Car. II. c. 3, enacts—Sect. 5. “That; from and after the said four-and-twentieth day of June, all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this Statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.”

Sec. 19. “And for the prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury: Be it enacted by the authority aforesaid, that, from and after the aforesaid four-and-twentieth day of June, no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is

2. The object of the present work is to answer an important practical question, to which this enactment gives rise, namely—Under what restrictions is the admission of extrinsic evidence, in aid of the exposition of a will, consistent with the provisions of a statute, which makes a writing indispensable to the purpose for which the instrument was made?¹

3. The preceding paragraph has been objected to, as not accurately raising the question which the title of this volume professes to examine. It has been urged,

not proved by the oaths of three witnesses (at the least), that were present at the making thereof; nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will or to that effect; nor unless such nuncupative wills were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she had been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling."

The repealing clause of the 7 Will. IV & 1 Vict. cap. 26, enacts, *inter alia*, that an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled 'The Act of Wills, Wards, and Primer Seisins,' whereby a man may devise two parts of his lands, and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for the Prevention of Frauds and Perjuries,' as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein, shall be repealed, except so far as the two last-mentioned Acts, or either of them respectively, relate to any wills or estates *pur autre vie* to which the repealing Act does not extend. The latter Act (sec. 9) then provides, generally, that no will shall be valid unless it shall be in writing, and unless its execution be attended by the formalities thereafter prescribed.

¹ The Statute of Wills, 32 Hen. VIII, c. 1, had, to a certain extent, raised the same question at an earlier period. As the Statute of Frauds embraces property of all descriptions, the former statute may well be passed over without affecting the substantial question which is discussed in the following pages. [See preceding note.]

“that the practice of admitting extrinsic evidence to interpret wills, had obtained at common law before the existence of the statute, and that this practice was properly continued after the statute; for that it was not the intention of the framers of the statute to alter or abridge any legitimate or established modes of expounding a written instrument, but merely to substitute a written for a nuncupative will; that the statute made a writing indispensable in certain cases, in which a writing was previously unnecessary, but left untouched the means of expounding the writing which it required; and that courts of law therefore must, notwithstanding the statute, be at liberty still to avail themselves of the aid of extrinsic evidence, to the full extent to which authority had, before the statute, established its admissibility.”¹ If the reasoning upon which the objection is founded were admitted to be correct, the author is not prepared to admit that the objection itself would be so. The objection points only at the effect or consequences of the statute, and does not displace the proposition in the text, that the statute is the source from which those effects or consequences flow.²

4. The restrictions under which extrinsic evidence was by the common law (before the statute) admissible, in aid of the exposition of a written instrument, in cases in which the law did not require a writing, will of course

¹ This point will be again observed upon in a later page, *infra*, pl. 154.

² Whether the learned author has conclusively refuted the above objection, the reader must decide. It is no doubt true that the statute gave rise to the important practical question stated in the author's second paragraph; but it seems equally clear that this question is not coextensive with that to which the title of the volume professes to apply. The latter question existed previously to, and independently of, the Statute of Frauds, although undoubtedly changed in character, as well as in practical importance, by the various enactments which have since rendered writing essential to the validity of a testamentary instrument.

form a limit beyond which extrinsic evidence cannot be admitted to assist in expounding a writing which a statute makes indispensable. But a question may suggest itself, whether the construction of an instrument, which is made necessary by a *statute*, may not be subject to stricter rules than the common law alone would impose.¹

5. In this view of the case it might, perhaps, appear that the more logical course of inquiry would be, first, to determine the state of the law before the statute, and then to ascertain whether the statute had to any and what extent affected the rules of law which it found in operation at the time it was passed. An attentive consideration of the subject, however, and of the authorities which apply to it, will show that such a course of investigation is uncalled for, and that it would embarrass rather than assist the inquiry. By the common law² (before the statute), parol evidence was inadmissible to contradict, vary, or add to a written instrument. As this rule, however, was founded on a principle of convenience only, it was holden, before the statute, that parol evidence was, in certain cases, admissible to determine the *person* or *thing* intended, *where the description in the instrument was insufficient for that purpose*—as in a devise to A. B., where there were two persons of the same name; or a devise of the manor of Dale, where the testator had two manors of that name, North Dale and South Dale. In which cases parol evidence of witnesses who spoke to the testator's *intention*, was held admissible to determine which of the two persons, named respectively A. B., and which of the manors of Dale,

¹ *Infra*, pl. 154.

² 1 Phil. on Evid. 548–561, 7th ed.; [2 *ib.* 339 *et seq.* 10th ed.;] *Partridge v. Powlet*, 2 Atk. 383; and see Prop. VI, *infra*, pl. 105; *Goss v. Lord Nugent*, 5 B. & Adol. 58.

was intended by the testator.¹ And from the cases cited in a subsequent page,² it will be seen that where the identity of the *person* or *thing* intended by a testator has been the only point in dispute, and the description in the will has been insufficient to determine it, courts of law, since the statute, have in like manner, in certain special cases, admitted the evidence of witnesses who spoke to the testator's *intention*—to make certain the person or thing intended by the testator.

6. Whether the admission of extrinsic evidence to make certain the person or thing intended, where the description of the will is insufficient for the purpose, can, upon principle, be reconciled with the provisions of the statute, in all the cases in which it appears to have been admitted, is a point which, for the present, may be left in suspense. It is sufficient in this place to observe, that, notwithstanding the cases in which parol evidence of the nature just adverted to has been held admissible, the courts had uniformly professed to be governed by an admitted principle—that the judgment of a court³ in expounding a will should be simply *declaratory* of what is *in* the instrument. This was the general rule at common law before the statute; and if the statute has not strengthened its obligations, it certainly has not relaxed them.⁴

[The exclusion of parol evidence in aid of the construction of wills is founded on the principle that “otherwise it were great inconvenience that not any may know, by the written

¹ *Infra*, pl. 136.

² *Infra*, pl. 139 *et seq.*

³ It has not been thought necessary or useful to distinguish the provinces of the court and jury. Each, within its own province, is in principle bound by the rules which it is the object of these pages to elucidate. In courts of equity the judge performs the office of both.

⁴ See Prop. VI, *infra*.

words of the will, what construction to make, if it might be controlled by collateral averment, out of the will.”¹ The rules of equity are the same as those of law in respect to the admissibility of parol to aid in the construction of a will if there is no collateral equity or fraud in question.²

[Sir James Wigram was doubtless right in supposing that the rules relating to the admissibility of extrinsic evidence in aid of the interpretation of a will, are different in England from those which apply to other written documents, yet the vice-chancellor did not defend his position on the only ground on which it was tenable. In those States where no formalities, except a writing, are required for a will, extrinsic evidence is admissible precisely as if the question related to the construction of a document *inter vivos*. But where, as in the State of New York, attestation and publication are necessary for the making of a will, all collateral written evidence is not more admissible than if it was merely oral, although any number of documents is sometimes admissible to interpret a written contract *inter vivos*. Judge Redfield,³ however, lays down, with scarcely any qualification, the position that wills and contracts are governed by the same rules in respect to parol evidence. The judge probably meant by parol merely oral testimony, though even oral evidence is admissible in equity as regards accident or mistake in the case of a written contract, but not in the case of a will.⁴ The judges statement, however, is to be considered as so far referring merely to evidence at law. As regards public policy, it seems that in America the wills' acts are construed just as other statutes.

[Sir James Wigram's opinion, that a statutory is stronger than a common law rule, is not borne out by the adjudication in *Mellish v. Vallins*.⁵ In that case, a primary liability imposed by statute on mortgaged land to satisfy the mortgage debt, was held to be more easily evaded than the primary (or rather sole), liability of personalty at common law. But, there is certainly reason to contend that a statute founded on principles of

¹ The Lord Cheney's Case, 5 Co. 68 b.; Vernon's Case, 4 Co. 1; 4.

² See 2 Vern. 366; 1 L'd Raym. 438, in note.

³ 1 vol. 462.

⁴ *Newburgh v. Newburgh*, 5 Mad. 364; *Langston v. Langston*, 8 Bligt. N. S. 167.

⁵ 2 Jo. & H. 194.

public policy will be more strictly enforced than an ordinary statute or rule of common law.

[Wills, then, are interpreted like other written documents, with the aid of extrinsic evidence, in cases :—

[1. Where the evidence is adduced to show that the whole alleged will, or a part thereof, is void in law ; or 2, has been forged, or 3, otherwise fraudulently obtained ; or 4, to rebut the presumption of a resulting trust ; or 5, to identify the subject or object of gift :¹

[2. Where the conscience of the heir or devisee is sought to be charged, in a suit for specific performance, on the ground of having obtained from the testator a benefit on the faith of a promise which is the foundation of the suit :²

[3. Where an extrinsic document is incorporated in the will by reference. *Verba relata inesse videntur* :

[4. Wills, so far as they contain executory limitations, are construed like articles *inter vivos*. But all wills are not executory ; and so far as any limitation or trust is executed in terms, it will be so construed.

[Extrinsic evidence is admissible to prove that the will is either wholly or partially illegal and void, as having been obtained through fraud or undue influence, or as being contrary to public policy. In short, any evidence admissible to defeat a written contract, on the ground of fraud or illegality, is equally receivable in the case of a will.

[Wills are not interpreted with the aid of extrinsic evidence admissible to help the construction of other documents :—

[1. Where the collateral evidence tendered is a document not executed according to the law of wills and not referred to in the will :

[2. Parol evidence of accident or mistake will cause a will or part thereof to be set aside, but not rectified as in similar cases *inter vivos*. See *Earl of Newburgh v. Countess of Newburgh* ;³ *Hippesley v. Homer*.⁴ For, volunteers under wills have no equity whereon to found a suit for specific performance.

¹ *Mallabar v. Mallabar*, Cas. Temp. Talb. 79 ; see *Jones v. McKee*, 3 Barr. (Penn.) 496.

² *Strickland v. Aldridge*, 9 Ves. 519 ; see *Drakeford v. Wilkes*, 3 Atk. 539.

³ 5 Madd. 364.

⁴ Turn. & R. 48*n*.

[3. A discharge of a written agreement may be proved by parol. But a revocation of a will, as distinguished from the satisfaction or ademption of the gifts comprised in the instrument, can only be established by the statutory evidence.

[Documents not referred to in the will are admissible only on the same footing as oral testimony in those States which require a will to be executed with any solemnity. This was decided in the early case of *Bertie v. Falkland*,¹ where papers and letters of the testator were tendered in aid of the construction, but were rejected by the court.

[*Semble*, in America, documents referred to either in a will or instrument *inter vivos*, need not be described as carefully as is required by the rule in *Boydell v. Drummond*.²

[A will is construed with the aid of parol evidence in respect to "equities" of a legal or presumptive nature, but not where the equity is one of *bonâ fide* part performance, or springs from other matter *in pais*; although even such a practical equity, as distinguished from a legal or presumptive inference against the letter of the will, can be enforced if the case involves fraud.

[As a party to a deed is estopped by recitals therein, evidence is thus shut out which is admissible under a will in certain cases of ambiguous description. This is accidental, however, in those particular cases, and is not connected in principle with any general rule respecting the admissibility or use of parol evidence. Certain statutes also, like the navigation acts, being founded on principles of public policy, are more rigidly enforced than the wills' acts, with respect to the point under inquiry. Even fraud is not admissible in evidence when the title to a registered ship is in question, in the case of an unregistered transfer.³

[The statutes requiring wills to be in writing thereby exclude parol testimony of the testator's intention so far as the evidence tendered would operate either to contradict, revoke, or annul the writing,⁴ or even explain it, except so far as such explanation is applicable in the case of any written document.

¹ 1 Salk. 231. See *Bennett v. Davis*, 2 P. Wms. 316, 318.

² 11 East, 141.

³ See *Chapman v. Calis*, 9 C. & B. N. S. 769.

⁴ *Kinsey v. Rhem*, 2 Iredell, 192.

The only question respecting the admissibility of such testimony arises when it is tendered not merely for the purpose of supporting the testator's written dispositions in their primary, but *ut res magis valeat* in some other sense. The construction of wills by the aid of oral testimony is always allowable in support of the primary meaning of the text, according to the general rule applicable to the admissibility of such testimony in aid of written evidence. This branch of testamentary law, therefore, is a subdivision of a more general province of jurisprudence. The subject thus naturally divides itself into two heads. The first relates to the general rules respecting the application of parol to written evidence in general. The second head comprises the special features impressed on testamentary parol evidence by the statutes relating to the making and proof of wills. As regards the general law of oral evidence, it is strictly applicable to wills, provided that we confine our review to evidence at law as distinguished from equity. For all beneficiaries under wills are volunteers, and as such can have no equity. It is strange, therefore, that cases arising under deeds are not more largely referred to in contentions under wills, since, with the distinctions just referred to, they are most accurately in point.

[The law holds out a bounty on the reducing of contracts to writing by precluding the adduction of parol evidence in such cases. If extrinsic evidence was freely admitted, the utility of a written instrument would be greatly curtailed, while the defects and errors of memory would be substituted for the permanent *littera scripta*.

[The rule excluding parol evidence applies to simple, equally as to special or sealed, contracts.¹ In neither case are any words to be added to the document,² and where the language used has a settled legal construction, or there is a settled legal presumption with respect to the time when any act referred to in the document is to be done, parol evidence is not admissible to show that the parties had a different intention.³ Construction, or legal interpretation, is thus confined to the light of the context, so far as the document itself can afford light.

¹ Stackpole v. Arnold, 11 Mass. 31; Hunt v. Adams, 7 Mass. 522.

² 1 Greenleaf on Ev. § 277.

³ Warren v. Wheeler, 8 Met. 97.

[Greenleaf considers that the rule excludes "all evidence of intention, whether direct or inferential," even in the case of a contract, and that the court merely puts itself in the position of the contracting parties.¹ But, of course, this is with the view of inferring the intention of the parties. As regards contracts, however, subsequent declarations fall properly under the head of admissions, and are important in Chancery as affecting the evidence of the equities of the transaction.

[The principle on which parol evidence is at all admitted in aid of the construction appears to be necessity, and *necessitas non habet legem*. It is impossible that any document could contain *in extenso* a description of all the circumstances to which it will relate. To require such details would be to render documentary evidence wholly useless. The statements to be comprised in a document, therefore, are only particular matters of fact which cannot be presumed to be generally known. But neither a general law of the land, nor facts, such as foreign laws, of which the court will take cognizance on special proof, general and local customs, or even individual usages, as pet or nick names, which are governed by no general rule of law, need be referred to in a document or will. They are matters of every day dealing and notoriety, to admit parol evidence of which seems safe, easy, and unlikely to tempt to perjury; since opposing testimony could then be adduced. As the impossibility of comprising all particulars in a document has led to their being proved, if of a general nature, by parol, so the same necessity renders evidence of intention admissible to identify the subject or object of a gift. Otherwise, identification would in many cases be impossible.

[The American law respecting the admissibility of parol testamentary evidence is generally considered to differ widely from that of England, and to admit of parol evidence of the testator's circumstances in almost every case of ambiguity, both latent and patent,² while it conforms to the law of England in confining extrinsic evidence of the testator's intention to cases of latent ambiguity.³

¹ Greenleaf on Ev. § 282*a*.

² *Brownfield v. Brownfield*, 20 Penn. St. 55; *Johnson v. Johnson*, 32 Ala. 637.

³ *Id.*

[There is no general law throughout the United States, however, established either by statute or construction, as to the extent to which parol testamentary evidence is admissible. In some States the English rules will be followed in the main.¹ But, in most of the States, undoubtedly, extrinsic evidence of the testator's circumstances, as distinguished from his intention, will be admitted in aid of the construction of any expression left ambiguous by the context. In fact, so late as Lord Campbell's time, we find, even in England, lawyers of the highest rank asserting that they would examine the condition of all the testator's property in aid of an ambiguous will. The American rule is, therefore, likely to terminate ultimately at the goal where the analogous English rule is now definitively fixed.]

[In New York,² the courts rigidly adhere to the English rules, and admit no extrinsic evidence, except to explain a latent ambiguity. In *Tole v. Hardy*,³ the state of the testator's property was not allowed to be shown in order to prove his intention to charge a legacy on land exclusively. In Delaware, however, it has been decided, in *Sutton v. Sutton*,⁴ that extrinsic evidence may, in all cases, be received of the age of the testator, his health, circumstances, affections, and of the persons around him at the time of his making the will.]

[In Ohio, also, the strict rules of construction prevail⁵ with respect to the exclusion of parol evidence, except in cases falling under propositions III, V, and VII, as in England.]

[In Maryland, the strict rules of construction prevail, and no parol evidence is admitted, except as in England.⁶

[In the subsequent pages a reference to parol evidence alludes to testimony adduced to aid, or rather alter, the construction and relating to the testator's circumstances, but not to his intention, except where that is distinctly expressed.]

¹ *Kurtz v. Hibner*, Sup. Ct. Ill. 1871.

² *Mann v. Mann*, 1 Johns. Ch. 231; s. c. affirmed 14 Johns. 1; *Jackson v. Sill*, 11 Johns. 201.

³ 5 Harring. 459.

⁴ 6 Conn. 333.

⁵ *Worman v. Teagarden*, 2 Ohio N. S. 380.

⁶ *Walston v. White*, 5 Md. 297.

7. To return, then, to the question stated at the outset: Under what restrictions is the admission of extrinsic evidence, in aid of the exposition of a will, consistent with the provisions of the Statute of Frauds?

8. The answer to this question is usually given in the terms of the common maxim which distinguishes ambiguities into two kinds, *latent* and *patent*—admitting extrinsic evidence in the former case, and excluding it in the latter. As the maxim itself, however, requires much explanation, it has been thought most convenient to exclude it altogether as a guide in the present inquiry, and to make it the subject of a separate examination, in confirmation of the principles which, in the following pages, are submitted to the consideration of the reader.

[Lord Bacon's illustrations of patent ambiguities relate to the conveying or "willing" element, and not to the subject or object of the gift.¹ Such patent ambiguities render the passages void.²

[It is, perhaps, to be regretted that Sir James Wigram did not keep the distinction between the two kinds of ambiguities more before him, as his great analytical and generalizing powers would have, doubtless, elucidated the old distinctions with new philosophic comments and illustrations of no ordinary value. These, however, now are given by him only with reference to his own seven propositions.]

9. The question just suggested has become much perplexed by a want of proper attention, on the part both of the courts and of text writers, to the different *purposes* to which the admissibility of extrinsic evidence in aid of the exposition of wills may be applied, and to the different *nature* of the evidence which

¹ See *Fish v. Hubbard*, 21 Wend. 652.

² *Worthington v. Hylyer*, 4 Mass. 205; *United States v. Cantrill*, 4 Cranch, 167.

(with reference to such different purposes) parties have tendered for admission. It is said (and correctly), that the statute, by requiring a will to be in writing, precludes a court of law from ascribing to a testator any intention which his written will does not express, and, in effect, makes the writing the only legitimate evidence of the testator's intention. ("No will is within the statute but that which is in writing; which is as much as to say, that all that is effectual and to the purpose must be in writing, without seeking aid of words not written."¹ At the same time, however, courts of law, though precluded from ascribing to a testator any intention not expressed in his will, admit their obligation to give effect to every intention which the will properly expounded contains.) The answer, therefore, to the question above proposed—enjoined as well as sanctioned by the general principle above mentioned—must be, that any evidence is admissible which, in its nature and effect, simply explains what the testator *has* written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he *intended* to have written. In other words, the question in expounding a will is not—What the testator meant? as distinguished from—What his words express? but simply—What is the meaning of his words?² And extrinsic evidence, in aid of the exposition of his will,

¹ Brett v. Rigden, Plow. 345; and see 2 Vern. 625; Hobart, 32; and see Hiscocks v. Hiscocks, *infra*, pl. 183.

² In Doe d. Gwillim v. Gwillim, 5 B. & Adol. 129, Parke, J., said: "In expounding a will, the court is to ascertain, not what the testator actually *intended*, as contradistinguished from what *his words express*, but what is the meaning of the *words he has used*." And in Rickman v. Carstairs, 5 B. & Adol. 663, Lord Denman, C. J., said: "The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have

must be admissible or inadmissible with reference to its bearing upon the issue which this question raises.

10. The distinction involved in the last observation between evidence which is ancillary only to a right understanding of the *words* to which it is applied, and which is therefore simply *explanatory of the words themselves*,—and evidence which is applied to prove *intention itself* as an independent fact, is broad and palpable;—and as this distinction is essential to a right understanding of the subject, and will frequently be referred to in the following pages, it may be convenient to adopt the expression, *explanatory evidence*, to describe such extrinsic evidence as is strictly of the former kind; and to adopt the expression, *evidence to prove intention*, to describe the latter species of evidence. The expressions do not, perhaps, satisfactorily explain themselves; but, with the aid of the preceding observations, the distinction intended to be taken will be understood.

11. It should be further observed, that it is not, as an insulated question, that the admissibility of extrinsic evidence in aid of the exposition of wills, can properly

used?" See also, *per* Littledale, J., in *Doe d. Templeman v. Martin*, 4 B. & Adol. 783; and *per* Parke, J., in *S. C. 1 Nev. & Mann. 524*.

[“The expression, that the rule of construction is to be the *intention* of the testator, is apt to lead into error, because the word is capable of being understood in two senses, namely, as descriptive of that which the testator intended to do, and of that which is the meaning of the words which he has used. The will must be in writing; and the only question is, what is the meaning of the words used in that writing? To ascertain which, every part of it must be considered, with the help of those surrounding circumstances, which are admissible in evidence to explain the words, and put the court as nearly as possible in the situation of the writer of the instrument, according to the principle laid down in the excellent work of Sir James Wigram on that subject.”—*Per* Lord Wensleydale, in *Grey v. Pearson*, 6 Ho. Lo. Cas. 106.]

be considered. The subject is part only—and that a subordinate one—of a general system of rules, which Courts of law have established for the correct interpretation of wills; and the true nature and bearings of this particular question can be properly understood only when viewed in connection with the entire system of which it forms a part.

12. The SEVEN PROPOSITIONS following, applicable to the exposition of wills, and embodying (in its proper place) the particular subject of the present investigation, are submitted to the consideration of the reader, as the results both of principle and authority.

13. I. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.¹

14. II. Where there is nothing in the context of a will, from which it is apparent, that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted

¹ Upon this and every other point connected with the interpretation of wills, the reader will find the fullest information in Mr. Jarman's valuable edition of Powell on Devises. [To the second edition of this work, edited by Messrs. Wolstenholme and Vincent, the editor takes this opportunity of acknowledging his own repeated obligations.]

in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

15. III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

16. IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the Court of the proper meaning of the words.

17. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.

18. VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases—see Proposition VII.) will be void for uncertainty.

19. VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—Courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (*i. e.* the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator.

20. A separate examination of each of these Propositions will now be gone into.

PROPOSITION I.

*A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed.*¹

21. The first branch of this proposition will be familiar to the learned reader, and can scarcely require either explanation or authority to support it.²

¹ [In *Hicks v. Sallitt*, 3 De G. M. & Gor. 782; 18 Jur. 915; Lord Cranworth, C., said:—"When a testator uses a word which has a well-known ordinary acceptation, it must appear very certain that he has said on the face of the will that he uses it in another sense, before the ordinary sense can be interfered with. . . . In order to alter the meaning of a word, it must appear, not that the testator *might* have meant it in a different sense, but that he *must* have meant it in a different sense; and this can only be shown by pointing out some inconsistency in different parts of the will, or a positive statement of such being the sense intended, or a *reductio ad absurdum* by not taking the word in a qualified sense." See also *per* Sir James Wigram, V. C., in *Ford v. Ford*, 6 Hare, 490; *per* Lord Eldon in *Church v. Mundy*, 15 Ves. 406; *per* Lord Brougham in *Doe d. Winter v. Perratt*, 6 Mann. & Gr. 357; *per* Lord Erskine, J., in *Shore v. Wilson*, 9 Cl. & Fin. 512; *per* Lord Wensleydale, in *Grey v. Pearson*, 6 Ho. Lo. Cas. 106; and *per* Sir J. L. Knight Bruce, in *Key v. Key*, 4 De G. M. & Gor. 84; and in *Lowe v. Thomas*, 5 De G. M. & Gor. 316.]

² 1 Douglas, 341; 2 Ball & B. 204; *Id.* 506; 5 B. & Cres. 77, 82; *Crowder v. Stone*, 3 Russ. 223; [*Shore v. Wilson*, 9 Cl. & Fin. 355; *Mostyn v. Mostyn*, 5 Ho. Lo. Cas. 155; *Douglas v. Fellowes*, Kay, 114; *Saberton v. Skeels*, 1 Russ. & Myl. 589. See as to the *strict and primary meaning*

[The dictum of Lord Cranworth, in *Hicks v. Salitt*,¹ is of little use as a practical guide. For, almost every word has several different primary significations, while the legal sense is always considered a primary one. But, this legal sense almost invariably differs from the popular meaning.² Prior to the case of *Grant v. Grant*, the primary meaning of the word "nephew" was often modified and enlarged by the context, but not by parol evidence.]

22. The second branch of the proposition may be as briefly disposed of. For where it appears upon the face of a will, that the testator has used particular words in this or that particular sense, no adequate reason could possibly be assigned for rejecting the sense (however inaccurate) in which the testator himself *thus declares* he has used them.³ In such cases,

of the word "portrait," *The Duke of Leeds v. Lord Amherst*, 13 Sim. 459; s. c. on appeal, 9 Jur. 359; "jewels," *Brook v. Warwick*, 2 De G. & Sm. 439; *Cavendish v. Cavendish*, 1 Bro. C. C. 467; "relations," *Green v. Howard*, 1 Bro. C. C. 31; "cousins," *Stoddart v. Nelson*, 6 De G. M. & Gor. 68; see s. c. 4 W. R. 109; "family," *Re Terry's Will*, 19 Beav. 580; *Gregory v. Smith*, 9 Hare, 708; "domestic," *Ogle v. Morgan*, 1 De G. M. & Gor. 359; "devise," *Morgan v. Morgan*, 4 De G. & Sm. 173; "money," *Larner v. Larner*, 3 Drew, 704; *Manning v. Purcell*, 7 De G. M. & Gor. 55; "effects," *Doe d. Haw. v. Earles*, 15 M. & W. 450; etc., etc.]

¹ 3 De G. M. & G. 782.

² See *Grant v. Grant*, 39 L. J. N. S. 272.

³ [The right of every testator thus to act as his own interpreter might be illustrated by examples almost without end. Thus, in deference to the context, the word "money" has been held to pass stock in the funds, *Dowson v. Gaskoin*, 2 Kee. 14; a husband has been held to be one of the objects of a power expressed to be in favor of his wife "and her family," *McLeroth v. Bacon*, 5 Ves. 159; "descendants" have been permitted to take as "representatives," *Styth v. Monro*, 6 Sim. 49; and, "next of kin" as "legal representatives," *Walter v. Makin*, 6 Sim. 148; *Walker v. Marquis of Camden*, 16 Sim. 329; words of limitation have been treated as words of purchase, *Bagshaw v. Spencer*, 2 Atk. 580; and the use of the words "joint tenants" held consistent with the creation of a tenancy in common, *Booth v. Alington*, (V. C. S.) 5 W. R. 811; "all" has been read "any," *Doe d. Gallini v. Gallini*, 5 Barn. & Ad. 621, and "fifth schedule" substituted for "fourth schedule," *Hart v. Tulk*, 2 De G. M. & Gor. 300;

therefore, a departure from the strict and primary sense of the words, in favor of the testators's intention, is properly, and indeed necessarily, permitted.¹

the word "issue" has been restricted so as to mean "children" only, *Pope v. Pope*, 14 Beav. 591; *Slater v. Dangerfield*, 15 M. & W. 263; and the word "children" enlarged so as to be construed "issue" generally, *Farrant v. Nichols*, 9 Beav. 329; "nephews and nieces" have been held to include great-nephews and great-nieces, *James v. Smith*, 14 Sim. 214; the copulative particle has been read as the disjunctive, and *vice versa*, *Green v. Harvey*, 1 Hare, 431; *Day v. Day, Kay*, 703; *Morris v. Morris*, 17 Beav. 198; *Maude v. Maude*, 22 Beav. 290; "freehold estate" has been held synonymous with "real estate," *Reeves v. Baker*, 18 Beav. 372; expressions large enough to have included real estate have been restricted to personality, *Coard v. Holderness*, 20 Beav. 147; and the words "legacy" and "bequest" respectively, extended to signify a devise of real estate, 1 Ea. 37, n. b; *Whicker v. Hume*, 14 Beav. 518; etc.

[The above Proposition obviously distributes itself under the two following rules:—

[1. No word or phrase can be divested of its strict and primary meaning, by reference to the context, until the court is satisfied, by such context, that the testator did not employ such word or phrase in its strict and primary sense.

[2. No word or phrase can be clothed with a secondary or incorrect meaning, by reference to the context, until the court is satisfied, by such context, as to the exact sense in which the testator did employ such word or phrase.

[See *Mellish v. Mellish*, 4 Ves. 45; *Walker v. Tipping*, 9 Hare, 800; *Auther v. Auther*, 13 Sim. 422; *Taylor v. Richardson*, 2 Drew. 16; 1 Jarm. Wills, 2d Ed. 420.

[By force of the controlling context, a word or phrase *may*, in one part of a will, bear a meaning different from that assigned to it in another: *Dalzell v. Welch*, 2 Sim. 319; *Carter v. Bentall*, 2 Beav. 551; *Head v. Randall*, 2 Y. & Coll. C. C. 231; *Williams v. Teale*, 6 Hare, 239; *Hedges v. Harpur*, 9 Beav. 479; *Neathway v. Reed*, 3 De G. M. & Gor. 18. See, however, *per* Lord Brougham, in *Doe d. Winter v. Perratt*, 6 Mann. & Gr. 362; and *per* Lord Cottenham, in s. c. *ib.* 385; *Leeming v. Sherratt*, 2 Hare, 14. As to the effect of a clear mistake upon the face of a will, see *Langston v. Langston*, 2 Cl. & Fin. 240; *infra*, pl. 57, n. d.]

¹ See *Royle v. Hamilton*, 4 Ves. 437; 2 Eden, 196, n. a, and the cases there cited; 3 Bro. C. C. 68; 1 Doug. 341; 5 Ves. 401; 8 Ves. 10; 10 Ves. 195; *Winterton v. Crawford*, 1 R. & Myl. 407. According to the same principle carried to its extent, it seems that where there are several successive instruments all referring to the same subject, the court will look at them all. *Courtney v. Ferrers*, 1 Sim. 137. So, also, where several

23. In the case of *Dent v. Pepys*,¹ the Vice-Chancellor substituted the name of one set of devisees for another, upon the ground that the context of the will required him to do so.

[Parol evidence, then, is admissible, in aid of the construction, 1, where there is a latent ambiguity; 2, to rebut a resulting trust; 3, to prove that the will or part thereof is not the will of the testator, but has been obtained through fraud, or otherwise is not a *bonâ fide* statement of his will; or, 4, has been defeated by lapse or ademption.²

[The primary sense of the terms used being insensible, then a secondary sense is tried, or part of the description is eliminated as so much false demonstration. It is possible, however, that after all these efforts of the court the will may be still void for uncertainty. This may happen if two or more claimants appear each equally suiting the description in the will, and yet neither being able to adduce any extrinsic evidence sufficient to incline the scale in his favor.

[Jarman³ says that "no word or phrase can be divested from its appropriate subject or object by extrinsic evidence showing that the testator commonly, much less on that particular occasion, used the word in a sense peculiar to himself, or even in any general or popular sense as distinguished from its strict and primary import."

[This passage is erroneous. Accordingly the editor in a note intimates that the doctrine of the text is true only if no appropriate subject or object exists. The case of *Kurtz v. Hibner* was, however, recently decided by the Supreme Court of Illinois, on the principles expounded by Jarman. See *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Roosevelt v. Thurman*, 1 Johns. Ch. 220; *Mowatt v. Carow*, 7 Paige, 328; *Sherwood v. Sherwood*, 3 Bradf. Sur. 230.

[The interpretation put upon the words by 1, the context,

contemporaneous instruments form one transaction. *Colegrave v. Manby*, 2 Russ. 238.

¹ 6 Madd. 350.

² *Reffell v. Reffell*, Law Rep., 1 P. & D. 139, ch. 8.

³ 1 Jarman, ed. 1861, p. 386.

2, by statute, 3, by the local, 4, technical, or, 5, popular sense of the words used will be alone permitted¹ to unfold the intention of the maker of a will, or of a written contract, except where the identification of the subject or object is in question.

[The primary meaning of a testator will not be abandoned by the court in order to effectuate a bequest by giving a secondary sense to the terms in the will, if the primary meaning of the words involves a violation of a statute, *e. g.* the Navigation acts, or is otherwise opposed to a principle of public policy.² The primary meaning succumbs to a difficulty of fact, but not to one of law or policy.

[Although' the court will transpose words in order to make sense of, and give effect to, the whole will, yet such transposition cannot be effected with any aid from parol evidence. This, in *Castleton v. Turner*,³ where a testator gave various gifts, but only two women were mentioned throughout in the will, viz.: his wife and his niece, and at the end of the will he gave a particular estate to "her." Lord Hardwicke construed "the word 'her' to relate to the wife, on the ground that it was so used in the other parts of the will, and he then refused to admit parol evidence to show that the testator intended by the provision to refer to his niece.

[The meaning of words according to local usage will prevail over the primary meaning, and parol evidence can be given of the usage of the locality or of the testator.⁴ Even a prevalent and common mistake as to boundaries was considered in *Austee v. Nelms*,⁵ entitled to prevail over the description in the authorized maps. This rule, however, is hardly reliable. Or, rather, the maxim "*Communis error facit Jus*" can hardly be deemed applicable when the error in question cannot be very general, much less universal. It cannot, for instance, be shared in by those who have access to the maps and other evidences of the best kind relating to the point.

¹ *Smith v. Wilson*, 3 B. & Ad. 728; see *Brown v. Brown*, 8 Met. 576.

² *Tatham v. Drummond*, 10 Jur. N. S. 1087.

³ Cited 2 Ves. Sen. 216.

⁴ See *Doe d. Gore v. Langton*, 2 B. & Ad. 680. See, however, *Doe d. Brown v. Brown*, 11 East, 441; *Doe d. Chichester v. Oxenden*, 4 Dow. H. Lds. Cas. 65, *post*, p. 72.

⁵ 1 Hurl. & Nor. 225.

[The case of *Anstee v. Nelms* is reconcilable with the host of other cases to which it seems to be opposed by the fact that, at the time of making the will, all the testator's lands were *rated* for the parish of Doynton. This was legal evidence of the best kind that the lands were really all included in that parish. It was strictly a case of *communis error*.

[Statute law has not interfered much in the matter of construction, as distinguished from the execution, of wills. Cases, therefore, in England or in any State, are of authority throughout the Union.

[A case analogous to *Boydell v. Drummond*¹ is presented in the case of *Clayton v. Lord Nugent*,² except that the missing link related in the latter case to the attestation and not to a writing. The testator referred by an unattested writing to a card which would explain the terms and symbols used in the will. The card was held inadmissible as evidence of the construction. Had the card been referred to in the will, the maxim *verba relata inesse videntur* would have been applicable. The card then would be deemed to have been incorporated by reference.

[The maxim *verba relata inesse videntur* applies to wills. Any document, therefore, referred to in a will, is to be construed so far as part of the will. The case of *Sanford v. Raikes*,³ however, when strictly considered, is not, perhaps, any exemplification of the maxim *verba relata*. A document referred to in the will was adduced in evidence not for the purpose of explaining the will, but of identifying the subject of the devise. The document was held admissible for this purpose, although it might be doubtful whether for purposes of direct aid in the interpretation it should not be more specifically referred to as was held in the case of *Boydell v. Drummond*. See the comments of J. W. Smith on this case, in Smith's *Lectures on Contracts*.

[The doctrine contained in proposition number one, is virtually identical with the rule that a testator's general intention is to be deemed paramount to any adverse particular intention of his. See *Roddy v. Fitzgerald*, 6 H. L. C. 877. Both doctrines are examples of the general principle of construction *cy*

¹ 11 East, 141.

² 13 M. & W. 200.

³ 1 Mer. 646.

pres. Where every clause cannot receive its plain grammatical interpretation, a balance is struck, so to speak, and the meaning of a particular clause is determined not merely by the meaning of the particular terms used, but also by reference to every other clause in the same document, so far as the rules of law will allow, the net meaning being still further subordinated to the testator's primary or paramount designs.

[This modifying influence of the context may greatly alter the primary meaning of a particular passage. For, the contest is between two inconsistent primary meanings of two distinct clauses in the same document. Both of such primary meanings cannot prevail. The obvious alternative is a compromise. One written sentence is found to be opposed to another, if the grammatical sense of the terms used be alone regarded. Therefore, *ut res magis valeat*, instead of cancelling either or both, one or both are cut down to denote ideas and objects different from their primary ones. Even technical words will be despoiled of their special force when "from other words it is very clear that the testator meant otherwise."¹ No word will be expunged if possible. But, even words or clauses will be altered or expunged, if they are inconsistent with the primary intention of the testator, or are totally irreconcilable one with the other. In the last case put, the latter clause will be the one expunged, if it is not more intimately relative than the preceding clause to the testator's primary intention.

[Lord Kingsdown, in *Towns v. Wentworth*, 11 Moo. P. C. C. 526, expressed an opinion that, "when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator has by his will excluded, beyond all doubt, such construction." His Lordships here intimates an opinion that the use of a technical phrase affords stronger evidence of a testator's intention, and can be less easily cut down in meaning, than if the phrase were one of less legal significance.²

¹ *Per* Lord Wensleydale, in *Roddy v. Fitzgerald*, 6 H. L. C. 877; *Doe v. Gallini*, 6 B. & Ald. 640.

² See *Buck v. Nurton*, 1 B. & P. 57; *Thelusson v. Woodford*, 4 Ves. 329; *Jesson v. Wright*, 2 Bligh, 1.

The proposition, however, stated by Lord Kingsdown, does not prevail to any extent in America. But it is daily gaining strength in England, although it leans to the side of technicality.

[The First of Sir James Wigram's propositions was stated by him merely by way of inducement to what follows. Proposition number one relates only to intrinsic evidence or construction, and not to the main subject of his treatise. The reader, therefore, is referred to the supplementary treatise for further elucidation of Proposition one.]

PROPOSITION II.

Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances,¹ it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.²

24. The importance of this rule, and the strictness with which it is applied in practice, will justify the following statement of some of the principal cases by which it is illustrated.

25. Thus, though the word *child* may be construed to mean illegitimate child, where the proper meaning of the word is, of absolute necessity, excluded;³ yet, if no such absolute necessity exist, the word shall receive no other than its strict and proper interpretation.⁴

¹ [See per Coleridge, J., 9 Cl. & Fin. 525.]

² [See the judgment of Sir J. L. Knight Bruce, in *Bird v. Luckie*, 8 Hare, 301.]

³ See *infra*, pl. 51 et seq.

⁴ *Cartwright v. Vawdry*, 5 Ves. 530; *Godfrey v. Davis* 6 Ves. 43; *Fraser v. Pigott*, MS.; S. C., 1 Younge, 354; *Wilkinson v. Adam* 1 Ves. & B. 422; *Swaine v. Kennerly*, 1 Ves. and B. 469; *Harris v. Lloyd*, 1 Turn.

26. So, although in the case of a devise of "my real estate," property subject to a power may pass, where there is no real estate to satisfy the devise;¹ yet if there be *any* real estate upon which the will can operate, it is otherwise.²

& Russ. 310; *Mortimer v. West*, 3 Russ. 370. *N.B.* the recent case of *Bagley v. Mollard*, 1 Russ. & Myl. 581. [*Doe d. Thomas v. Beynon*, 12 Ad. & Ell. 481; *Owen v. Bryant*, 2 De G. M. & Gor. 703; *Warner v. Warner*, 20 L. J. Ch. 273, s. c. 15 Jur. 141; *Overhill's Trusts*, 1 Sm. & Gif. 362; *Gabb v. Prendergast*, 1 Kay & Joh. 439; *Pratt v. Mathew*, 22 Beav. 328. A child *en ventre sa mere* is, for all purposes of construction, considered as a living child: *Clarke v. Clarke*, 2 H. Bl. 399; *Clarke v. Blake* 2 Ves. jun. 673; *Storrs v. Benbow*, 3 De G. M. & Gor. 390.]

¹ *Infra*, pl. 53.

² *Lewis v. Llewellyn*, 1 Turn. & Russ. 104; *Denn. v. Roake*, 5 B. & Cres. 720; *Sug. on Powers*, c. 5, ss. 5, 6. *Hoste v. Blackman*, 6 Madd. 190; *Doe d. Caldecott v. Johnson*, 7 M. & Gr. 1047.

[The 7 Wm. 4 & 1 Vict. c. 26, enacts (sec. 24):—"That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will" (see *Bullock v. Bennett*, 1 Kay & Joh. 315, S. C. on appeal, 7 De G. M. & G. 283; *Goodlad v. Burnett*, ib. 341; *Cole v. Scott*, 1 Mac. & Gor. 518); and, sec. 27,—“That a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner" (see *Hawthorn v. Shedden*, 3 Sm. & Gif. 293), "shall be construed to include any personal estate, or any personal estate to which such description shall extend, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." (See *Stillman v. Weedon*, 16 Sim. 26.)

[Under the latter of these sections a general (as distinguished from a limited) power over personalty may now be executed by a bequest of personal property described in a general manner (*Spooner's Trusts*, 2 Sim. N. S. 129), and a general devise of realty under similar circumstances will have a like statutory effect (*Lake v. Currie*, 2 De G. M. & Gor. 536). But

27. So, personal estate subject to a power, will not pass under the words "my personal estate," whether

a mere general bequest of the testator's personal estate will still, as heretofore, be ineffectual as regards the execution of a limited power (*Cloves v. Awdry*, 12 Beav. 604). As regards the effect of a general devise of realty to the objects of a limited power, it may be questioned whether the author's reasoning in paragraph 27 must not now apply equally to the case of real estate. Suppose by will executed before 1838, A. having, as to certain real estate, a power of appointment among the children of B., and being entitled to no other realty, made a general devise in their favour; it is clear that the power would have been well executed for the reason stated by the author in paragraph 26. But suppose the devise subject to the new law, it is equally clear that, by virtue of sec. 24, it *might* have had an operation without executing the power. Thus what would have been a good execution of the power under the old law would, in the case put, be no longer so under the new. If this conclusion be correct, the language of Lord St. Leonards in *Lake v. Currie*, which was the case of a *general* power, must be understood in a less extensive sense than that which at first sight it might appear to bear. "It is clearly settled," observed his Lordship, "that a general devise or bequest will not, independently of the late statute, operate as an execution of a power; but it is also settled, that where a testator disposes of real estate, not having any other than what is subject to the power, he is, in such case, to be taken as dealing with that estate, and that, as to both realty and personalty, if the Court is satisfied by the manner in which the particular property is referred to that the testator intended to deal with that property, the disposition will be a valid execution of the power. The cases have gone upon very fine distinctions, but the general rule is clear. It is said, however, that the late statute, which makes a general disposition operate as an execution of a power, and makes also the will take effect as from the death of the testator, has altered the law in this respect. It is argued, that, as before the statute a general bequest of personalty could not operate as an execution of a power, because it would not be any expression of intention on the part of a testator, who, although at the date of his will he might have no other property than that affected by the power, would yet know that the bequest would operate on whatever he might have at his death; so now, since real estate held by the testator at his death will pass by his will, the same rule must apply generally, and a disposition of realty will not operate as an execution of a power, even where the testator has no other at the date of his will, because he may at his death have property which will be affected by the devise. The statute, however, so far from operating in this way, gives greater extent to the intention of testators, and provides as to general powers of appointment that they shall be deemed well executed by a devise, unless a con-

the testator has personal estate at the time of making his will or not;¹ for, as personal estate acquired after the date of the will would pass by the will, it might possibly have had a sensible construction without departing from the strict meaning of the words.²

28. So, although the words, *son, child, grandchild*, etc., may be construed in a secondary sense, where the will would be insensible, if the primary meaning of the words were adhered to,³ yet it is only where that is the case that a departure from the strict sense of the words is permitted.⁴

29. In *Beaumont v. Fell*,⁵ Gertrude Yardley was

trary intention appear by the will. The intention was to extend, and not to narrow, the operation of devises, and therefore to hold that cases which before the statute would have been an execution are not so now, would be contrary to the whole scope of the Act; and if the new law is to operate at all, it must be in favor of the appointment. It is now absolutely necessary to show a contrary intention, to exclude the execution of a power, while under the old law it was needful to show the intention to exercise the power; the case is therefore stronger in favor of the appointees under the new than under the old law." See also *Walker v. Banks*, 1 Jur. N. S. 606.]

¹ [But now see 7 Will. IV. & 1 Vict. c. 26, s. 27, *supra*, p. 19, note.]

² *Andrews v. Emmot*, 2 Bro. C. C. 297; *Nannock v. Horton*, 7 Ves. 391; *Jones v. Tucker*, 2 Mer. 533; *Andrews v. Lemon*, cited 4 Dow, 90; *Jones v. Curry*, 1 Swanst. 66; *Webb v. Honnor*, 1 Jac. & W. 352. [*Dover v. Alexander*, 2 Hare, 285; *Davies v. Thorns*, 3 De G. & Sm. 347; *Lowell v. Knight*, 3 Sim. 275; S. C. 5 Sim. 116; *Lempriere v. Valpy*, 5 Sim. 108; *Dumner v. Pitcher*, 2 Myl. & K. 277; *Evans v. Evans*, 23 Beav. 1; *Shelford v. Ackland*, *ib.* 10.]

³ *Infra*, pl. 51, 52.

⁴ *Royle v. Hamilton*, 4 Ves. 437; 2 Eden, 196, n. ¹; *Reeves v. Brymer*, 4 Ves. 698; *Radcliffe v. Buckley*, 10 Ves. 195; *Shelley v. Bryer*, 1 Jac. 207; *Hart v. Durant*, 3 Anst. 684. [*Durrant v. Friend*, 16 Jur. 709; *Stoddart v. Nelson*, 2 Jur. N. S. 27; *Corporation of Bridgenorth v. Collins*, 15 Sim. 541; *Smith v. Lidiard*, 3 Kay & Joh. 252; *Crook v. Whitley*, 7 De G. M. & G. 490.]

⁵ 2 P. Wms. 140. And see the observations upon this case in *Hiscocks v. Hiscocks*, *infra*, pl. 183, [and in 1 Jarm. Wills, 2 Ed. 368. See also *Lee v. Pain*, 4 Hare, 251; *Ryall v. Hannam*, 10 Beav. 536; *Re Rickit's Trusts*, 11 Hare, 299.]

held entitled to a legacy, which by the will was given to Catherine Earnley. The Court, however, in that case held it to be material, that no person named Catherine Earnley appeared to claim the legacy.

30. In *Delmare v. Robello*,¹ the testator gave a legacy to the children of his two sisters, Reyne and Estrella. Reyne never was married; and before the date of the will she had become a nun professed, and had changed her name to Maria Hieronyma. The testator had a third sister, Rebecca, who had several children. The bill was filed by the children of Rebecca, claiming the legacy, upon the ground that Rebecca and not Reyne was intended; and evidence was offered to prove the fact, but the evidence was rejected and the bill dismissed.² See also the case from Swinburn, cited in *Beaumont v. Fell*, *ubi sup.*

31. In *Hampshire v. Peirce*³ a testatrix gave £100 to *the four* children of A., and at a great distance in her will from that legacy she *further* gave £300 to the children of A.—A., at the date of the will, had six children, two by a first husband, and four by a second. It was proved that the testatrix intended, by the first part of her will, the four children of the second mar-

¹ 1 Ves. jun. 412. S. C. 3 Bro. C. C. 446. See also *Holmes v. Custance*, 12 Ves. 279; *Blundell v. Gladstone*, 11 Sim. 467, 1 Ho. Lo. Cas. 778; *Daubeny v. Coghlan*, 12 Sim. 507.

² [Lord Thurlow, in rejecting the parol evidence, suggested that Maria Hieronyma might have changed her mind, and escaped into this country and had children, notwithstanding her vow. He decided, therefore, that the claim of the children of Rebecca was untenable, inasmuch as there was a sister answering to the name in the will; for he considered that the assumption of the conventional name did not prevent the applicability of the former name: it was part of the profession merely, and not meant for the world at large. See 1 Jarm. Wills, 2 Ed. 365, and *Mostyn v. Mostyn*, 3 De G. M. & Gor. 140; S. C. on appeal, 5 Ho. Lo. Cas. 155.]

³ 2 Ves. sen. 216. See the observations upon this case in *Hiscocks v. Hiscocks*, *infra*, pl. 183.

riage; the *same evidence* proved that she intended the same four children only by the second part. But though the Court gave effect to the evidence, so far as the first legacy was concerned, it refused to restrain the words in the second bequest.

32. In *Strode v. Russel*,¹ a testator devised his lands, tenements, and hereditaments *out of settlement* to A. The testator had some lands which were not comprised in any settlement; and was seized of a reversion in fee in other lands, which were subject to the trusts of a settlement. The Court was of opinion that a reversion in settled lands was a hereditament out of settlement, and (ultimately) refused to admit evidence to show that the lands not comprised in the settlement, and no others, were intended to pass.²

¹ 2 Vern. 621; 8 Vin. Abr. 194, pl. 23; 2 Atk. 374.

² [In *Hall v. Fisher*, 1 Coll. C. C. 47, the testator devised 'all that *freehold* farm, called the Wick Farm, in Headington, containing 200 acres or thereabouts, occupied by William Eeley, as tenant thereof,' to uses applicable to freehold property only. At the date of the will and of the death of the testator, Eeley held under a lease from the testator 202 acres of land in Headington, which were described in the lease as the Wick Farm. Of this property, 12 acres were leasehold.

[Sir J. L. Knight Bruce said:—"The word 'freehold' as used in this will, seems to me a necessary part of the description which cannot be rejected. If it had been omitted, the probability is, that the leasehold in question would have been held to pass. Again, if the whole of the farm had been leasehold, the insertion of the word 'freehold' would probably not have been material. But there is a subject here which properly answers the description given in the will. There is a freehold farm called the Wick, which contains 200 acres or thereabouts (incorrectness, if there be any incorrectness in that respect, is immaterial), and which is occupied by Eeley. Being of opinion that the freehold part of the farm is properly described by those words in the will, although the leasehold should be abstracted from it, I am obliged to say that not any leasehold land, although used and treated as freehold, can pass under this devise. I regret to be obliged to come to this decision, inasmuch as I think it likely that the testator intended otherwise, but did not sufficiently, or did not accurately, inform his solicitor of the circumstances of the property." See also *Wilson v. Eden*, 11 Beav. 237; *Morell v. Fisher*, 4 Exch. 591.]

33. In *Pocock v. The Bishop of Lincoln*,¹ a testator gave to his son R. the *perpetual advowson* of H. B., in Leicestershire. R., at the time of making the will, was incumbent of the living of H. B. R. claimed the absolute interest in the advowson; and in support of his claim it was argued, that he would take nothing by the will if it were construed to give him a life interest only. Held,² that he took only a life interest: for, if R. should resign the living to obtain ecclesiastical preferment, he would have, under the will, the right of presentation to the living; and so the will had *some* operation, without departing from the proper meaning of the words "perpetual advowson," which, strictly interpreted, are descriptive of the subject-matter of the devise, and not of the interest which the testator had in it.

34. In *Doe d. Oxenden v. Chichester*,³ the principle now under consideration was carried to its full extent. In that case, the testator devised his "estate of Ashton" to Oxenden. The testator had an estate which he used to call by the name of his "Ashton estate," and the accounts relating to which were kept in his steward's book under that name. Part only of this estate was *locally situated* at Ashton. The most conclusive evidence of intention to devise the whole estate, which the testator used to call his "Ashton estate," and not that part only which was locally situated at Ashton, was tendered. The Court, however, was of opinion that the words "estate of Ashton," strictly interpreted, were descriptive of an estate locally situated at Ash-

¹ 3 Brod. & Bing. 27; [and see judgment in *Dover v. Alexander*, 2 Hare, 283; *Barnacle v. Nightingale*, 14 Sim. 456; *Yates v. Maddan*, 3 Mac. & Gor. 532.]

² [Park, J., *dissentiente*: see his judgment.]

³ 3 Taunt. 147.

ton; and, as there was an estate locally situated there, the evidence was rejected. This judgment was affirmed on appeal to the House of Lords.¹

¹ 4 Dow, 65. See also *Hodgson v. Merest*, 9 Price, 556; *Whitbread v. May*, 2 Bos. & P. 593. But see *Doe d. Gore v. Langton*, 2 B. & Adol. 680. [In *Stone v. Greening*, 13 Sim. 390, the testator devised and bequeathed all his real and personal estate and effects to trustees, upon trust as to his *freehold* messuage, farm, lands, and hereditaments, situate in the county of Bucks, to apply the same for the benefit of the plaintiffs, according to the directions in his will contained. At the date of his will and of his death he was seised and possessed of a messuage, farm, and lands at M., in the county of Bucks, consisting altogether of 116 acres. Of this property, the messuage and about 94 acres were freehold, the rest being leasehold, held for the remainder of very long terms of years, the commencement of which (except as to one term of 1000 years, which dated from the reign of Queen Elizabeth) was unknown.

The freehold and leasehold portions of the property were so interspersed and intermingled, that it was impossible to distinguish the one from the other; and it appeared that the testator had always treated, described, and dealt with the whole 116 acres as being altogether freehold.

Sir Lancelot Shadwell, V. C., however, held, that as the testator had property in the county of Bucks, to which the words "my freehold messuage, farm, lands, and hereditaments" were correctly applicable, the leasehold part of the farm was not comprised in those words, but passed by the residuary bequest in the will.

The above decision was unquestionably a correct, however rigorous, application of the rule of law now under consideration. In the recent case of *Anstee v. Nelms*, 1 Hurl. & Nor. 225, the Court of Exchequer decided unanimously against a plaintiff, under circumstances which, it is submitted, might in strictness have entitled him to their judgment. A testator in 1804 gave, devised, and bequeathed all and singular his messuages, lands, tenements, and hereditaments *in the parish of Doynton*, in the county of G. The testator died possessed of a farm principally situated in the above parish, one portion of which, however, although surrounded by lands in Doynton, and generally reputed to form part of that parish, was in fact parcel of the parish of Wick. The Court held that the piece of land in question passed. Pollock, C. B., said:—"The question really is, whether this piece of land was parcel or not parcel of the thing devised. If it was reputed to be in Doynton, then the testator meant to give it. He did not mean that if, on investigation, this piece of land, which he supposed to be in Doynton, should turn out to be in Wick, it should not pass. He never intended that the question should depend on the parochiality of the subject-matter of the devise. If, in common with others, he thought

35. In *Doe d. Westlake v. Westlake*, a testator devised an estate to "Matthew Westlake, my brother, and

that the land was in Doynton, it passed by that description in his will. . . I have already intimated my opinion, that such a general reputation is sufficient to make it pass, with the rest of the property, by the general description of land in Doynton. I think so, notwithstanding that there is other property in Doynton which strictly answers the description, and that the jury have found that this particular property was in fact in Wick. By the gift of land 'in a parish,' a testator means to pass that which he understands—that which is generally understood—to be in the parish. A subsequent discovery of the true parochiality will make no difference; if it were otherwise, a will would mean one thing in 1804, and another in 1855."

Bramwell, B., said:—"The fact turns out to be that, when the testator made his will, this property was commonly reputed to be in Doynton. What, then, is the primary signification of the words 'in the parish of Doynton,' 'which shall be proved to be in Doynton,' or 'commonly reputed to be in Doynton?' I hold the latter to be the natural meaning of the words. The land may have been reputed to be in Doynton for five hundred years; but afterwards, on an inquiry being instituted or on reference to Domesday book, or some other ancient or forgotten record, it may turn out to be in another parish. Suppose a man were to devise an estate which he always supposed to be conterminous with a particular parish. If he devised it by the name and description by which he knew it, I think the case would be similar to those where a man has devised to another by a wrong name. The defendant appears to me to be entitled to this piece of land, if the will is construed according to the terms of Sir J. Wigram's first proposition, namely, that a testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptance."

It is extremely difficult to reconcile the above decisions. In either case there was a subject to which the words of the devise were correctly applicable: in either case there was room for conjecture that the testator intended to pass something, to which the words of the devise were not correctly applicable: in either case this conjecture depended upon the alleged ignorance of the testator with regard to the property incorrectly described. And, however much the argument founded upon popular reputation may have weighed with the Court in *Anstee v. Nelms*, it must be recollected that, *ex concessio*, such reputation had no more operated to affect the actual parochiality of the spot of land in Wick, than had the belief and conduct of the testator in *Stone v. Greening*, converted his leasehold lands into freehold. The last observation attributed to the learned Chief Baron in *Anstee v. Nelms* is, it is submitted, inconclusive. The discovery of a fact previously unknown, *e. gr.* the illegitimacy of

unto Simon Westlake, my brother's son."¹ The testator had three brothers, each of whom had a son of the name of Simon. The Court was of opinion, that, in point of legal construction, when the testator spoke of his brother's son, he must be taken to mean the son of that brother who was then particularly in his mind; and decided, that evidence of declarations by the testator was, *for that reason*, inadmissible to prove that he meant Simon, the son of his brother Richard.²

child,—a misfortune of which the testator and those about him may have lived and died in ignorance,—may surely at any time cause a will to express what, but for such discovery, it would not have expressed.

The holding of *Bramwell, B.*, can scarcely, it is conceived, be reconciled with any imaginable test by which the strict and primary meaning of a testator's words can be ascertained.

See also *Brown v. Brown*, 11 East, 441; *Parker v. Marchant*, 6 Scott, N. R. 485; S. C. 5 Mann. & Gr. 498; *Moser v. Platt*, 14 Sim. 95; *Quennell v. Turner*, 13 Beav. 240; *Attwater v. Attwater*, 18 Beav. 330; *Ricketts v. Turquand*, 1 Ho. Lo. Cas. 473; *Doe d. Browne v. Greening*, 3 M. & Sel. 171; *Wilkinson v. Bewicke*, 3 De G. M. & Gor. 937; *Webb v. Byng*, 1 Kay & Joh. 580; *Hall v. Fisher*, *supra*, pl. 32, note.]

¹ 4 Barn. & Ald. 57

² [*Jefferies v. Mitchell*, 20 Beav. 15. 'In *Andrews v. Dobson*, 1 Cox, 425, a legacy was given to "James, son of Thomas Andrews, of Eastcheap, printer." There was no person of the name of Thomas Andrews discoverable in Eastcheap; but there was one James Andrews, a printer who lived there, and who had one son named Thomas by his first wife, who was related to the testator; he had also a son by a second wife, named James, who was in no manner related to the testator. The plaintiff, the son of the first wife, claimed the legacy, insisting that the testator meant "Thomas the son of James," instead of "James the son of Thomas," and praying some inquiry into the matter.

But Sir Lloyd Kenyon said, that though there were cases in which legacies were left to persons by nicknames, and evidence had been admitted to show that the testator usually called them thereby, yet this was beyond all precedent, and dismissed the bill.

In this case, the identity of the father was clear; but to have admitted the claim of a son who did not exactly answer the description in the will, as against a son who did, would have been in contravention of the rule of law contained in the above Proposition.]

36. In *Mounsey v. Blamire*, at the Rolls, 25 March, 1828, MS.¹ the testatrix gave the sum of £4,000 "to her heir." Evidence was tendered to prove that the person intended by the testatrix was an individual (a stranger) whom she had promised to make her heir and whom she used to call her heir. The heir-at-law the testatrix claimed the legacy. The Master of the Rolls decreed the legacy to the heir-at-law.²

¹ S. C. 4 Russ. 384.

² [The testatrix in this case left three persons her co-heiresses-at-law. It was argued, accordingly, that, since she plainly intended to give £4,000 as a legacy to some single individual, extrinsic evidence ought to be admissible to explain the latent ambiguity which would arise from construing the word 'heir' in its strict legal sense. But Sir J. Leach refused to admit such evidence, observing that the word 'heir' was *nomen collectivum*, and would legally include all those who filled that character. It was declared that the three co-heiresses took as joint tenants. See *Lord Truro, C.*, in *De Beauvoir v. De Beauvoir*, 3 Ho. Lo. Cas. 554.

In *Re Davenport's Trust*, 1 Sm. & Gif. 126, the testator directed his trustees to set apart £1,000 stock, and pay the dividends to his nephew G. C. D. for life; and after his decease, in case the said G. C. D.'s "wife should survive him to pay the dividends to her for life, to her separate use; and after the decease of the survivor of them, to divide the stock among such of the children of the said G. C. D. as should be then living in equal shares. The testator died in 1844, and his nephew G. C. D. died in the following year, a bachelor, but leaving five children by M., with whom he had cohabited since 1836. At the hearing (December 22, 1855) evidence was produced on behalf of M., for the purpose of showing that she had always been reputed and received by the members of the testator's family as the wife of G. C. D.; that as such reputed wife she had visited several members of such family; that G. C. D. was in the habit of corresponding with the testator; and that at the date of the will the testator must have known that M. was the wife, or reputed wife of his said nephew, and that, in fact, the latter was frequently alluded to by his uncle as having a wife and children.

In support of the claim of M., it was argued that there could be no doubt upon the evidence that the testator believed M. to have been the wife of his nephew, but that the bequest was to her, not in the character of a wife, but by way of description. The Court would not support a gift to a person who had assumed a false character with a view to fraud; but it was otherwise where, as in the present case, owing to circumstances arising from the legatee, the description was inapplicable (*Kennell v. A*

37. In *Boys v. Williams*,¹ the testator gave legacies of Bank Long Annuities stock. The assets of the testator being deficient, a question arose whether the state of those assets was admissible in evidence, as in the case of *Fonnerau v. Poyntz*,² for the purpose of enabling the Court to construe the words in a particular sense, in which it was alleged the testatrix had used them. The Vice-Chancellor (Sir Lancelot Shadwell) said: "The question before me is, whether there is so much difficulty in construing the expressions which this testator has used, as to authorize the admission of evidence as to the state of her assets. Before I can hear this evidence, I must be satisfied the ambiguity exists. . . . I do not mean to overrule the case of *Fonnereau v. Pontyz*, but that case was decided upon all the words taken together, and upon the particular words used in the will.

bott, 4 Ves. 802 *infra*. pl. 67, note). The mere fact of the legatee being known to the testator in a character which was not really her own, formed no ground for invalidating the gift (*Rishton v. Cobb*, 5 My. & Cr. 145; S. C. 9Sim 615).

It was admitted at the bar that the gift to the children could not be supported.

Sir J. Stuart, V.C., in deciding against the claim of M., observed that there was nothing in evidence to indicate that she was *personally* known to the testator, or known to him in such a way as to lead to the inference that she was intended when he referred to his said nephew's wife, or to justify the inference that she, and no other person, was in the mind of the testator when he framed the gift in question. "Suppose, for example," continued the learned Judge, "the nephew had survived the testator and married, and afterwards died, there would, in that case, be in existence a person exactly answering in every respect the legatee described in the will, namely, the nephew's wife. Could there be a doubt, that, under these circumstances, the wife would be entitled to the legacy? Yet, according to the construction I am invited to put upon this will, I should be bound to declare that the wife of G. C. D. did not answer the description contained in the will, but that this poor lady, who, it is conceded, was not the wife of the testator's nephew, is, nevertheless, accurately described as his wife." See also *Pratt v. Matthew*, 22 Beav. 328.]

¹ 3 Sim. 573.

² 1 Bro. C. C. 472.

*In this case I have no doubt about the meaning of the words, and, therefore, I think that I am not at liberty to look at the state of the testatrix's assets."*¹

¹ [But see S. C. on appeal before Lord Brougham, C. 2 Russ, & My. 689. His lordship said (p. 693), that upon the question as to the admissibility of the evidence, he entertained no doubt whatever that there had been a miscarriage in that part of the Vice-Chancellor's judgment. To the proposition, that, because the words of the will were clear upon the face of them, extrinsic evidence was inadmissible, it was wholly impossible to accede; that being the case of a latent ambiguity, the very case which according to all text writers, formed the exception to the general rule against admitting parol evidence to explain or construe the words of the instrument. It was because the ambiguity was not patent, but latent—that is to say, discoverable only upon reference to the subject-matter upon which the will purported to operate, that the Court was justified in resorting to extrinsic evidence at all. It was perfectly true that the Court was not at liberty in the case of any written instrument, whether a will of real or personal estate, or a deed, to introduce into the consideration of the question of construction any matter furnished by extrinsic evidence for the purpose of giving a different meaning to the words from that which their plain import conveyed. The Court was not at liberty, by matter of fact, to overrule the construction which was matter of law, arising on the face of the instrument itself. But that proposition was perfectly consistent with the admission of evidence to explain, though not to control, the language,—to aid, though not to vary or alter, the construction.]

In *Sayer v. Sayer*, 7 Hare, 377, the rule of law now under consideration was judicially commented upon by Sir James Wigram.

"The issue raised by these exceptions is whether the will refers to specific things, and the testatrix in that manner manifests her intention to execute her powers, or whether the legacies are merely general.

"The question is in substance one of 'parcel or no parcel.' The first bequests are clearly general in terms. Do the subsequent words, by which the Court considers necessary implication, show that the previous words describe the property subject to the power? In considering this question, I have referred to the state of the property subject to the powers of the testatrix, and also to the state of her own property at the date of her will.

"A question was made at the bar, whether I was at liberty to advert to the state of the above property in construing this will. This question might be answered by reference to the decree, which directs the Master to ascertain the state of such property at the date of the will. It is, however, better to meet the objection directly. The objection proceeds upon a mistake as to the purpose for which the reference in the decree was made

38. In *Fraser v. Pigott*, before Lord Lyndhurst, 4th July, 1831¹ the testator gave a sum of money to A. for life, with remainder to her children, and, if she died without children living at her death, then to such of his (the testator's) *grandchildren*, being *children* of his *late* sons, William and John, *whether born in wedlock or not*, as A. should appoint. The testator further gave £300 to William Fraser, the son of his *late* son William Fraser, and £250 to Isabelle and Anne, the daughters of his *late* son William. The testator further gave to his *grand-daughter*, Louisa Van H., the wife of Chrisp Van H., £200 to her separate use. The testator then gave the residue of his estate to his sons, William and John, equally, share and share alike, but directed that if either should die during his lifetime, the moiety of such deceased son should go and belong to his *children* equally; and if both die in his lifetime, in such case he gave the residue "to and amongst *all their children* equally, as

When, in construing a will, the question is whether a particular thing is described or not, the Court must admit evidence as to the thing said to be described, or it cannot be in a condition to determine whether the words of the will describe it or not. If evidence manifestly impertinent to that question be tendered, the Court is bound at once to reject it; and this is all that is decided by *Nannock v. Horton*, 7 Ves. 390-400, and cases of that class to which I was referred,—the amount of the personal estate at the date of the will being immaterial where the will speaks not from its date, but from the death of the testator. Where the evidence tendered may be material, the practice in equity is usually to admit it (as in this case) in the first instance, and reserve the question of its materiality until the hearing of the cause. In deciding upon its materiality, the Court is bound to construe the words of the will in their strict and primary sense, unless the circumstances of the case exclude that sense; and the Court is not at liberty to construe the words in any secondary sense, only because the state of the property or other extrinsic circumstances may make it in the highest degree probable that the words were used in such secondary sense. The strongest cases on this point are *Nannock v. Horton*; *Pocock v. Bishop of Lincoln* (*supra*, pl. 33); and *Doe d. Oxenden v. Chichester* (*supra*, pl. 34)."]

¹ M.S. And see same case, 1 Younge, 354.

tenants in common." [Both sons died in the testator's lifetime.] William left three illegitimate children, viz., the said William, Isabella, and Anne, and no legitimate children. John left three legitimate children and two illegitimate children, of whom Louisa Van H. was one. Lord Lyndhurst held, that the illegitimate children of William were entitled to a share of the residue, but that the illegitimate children of John were not so entitled.¹

¹ [It should not be overlooked that, according to the report of this case in *Younge*, the plaintiffs, the legitimate children of John, did not oppose the right of the illegitimate children of William to share with them in the residue, and that, consequently, Lord Lyndhurst must not be taken to have judicially decided this branch of the question. The admission of these last-mentioned children (their father being alive at the date of the will, although described as 'late' by the testator) was of course in direct contravention of the rule of law enunciated in the proposition now before the reader. And even had William been dead at the date of the will, it may be doubted whether the decision ascribed to Lord Lyndhurst upon the residuary bequest could be supported upon principle, and whether the mere fact of no legitimate child of William being found among a class who were to take *per capita* could affect the legal presumption that legitimate children only were intended.

In *Overhill's Trust*, 1 Sm. & Gif. 362, the testatrix bequeathed consols to trustees, upon trust to pay the dividends to G. for life, and after his death to divide the capital between all the children of the said G., and of M., the wife of B.

Testatrix died in 1837; G. in 1841; and M. in 1852. The latter left six illegitimate children by B. and no legitimate issue.

It appeared in evidence that these six illegitimate children were well known to the testatrix, who always expressed a strong interest in them and an intention to provide for them by her will; and it further appeared that, *at the date of the will*, M. was of the age of forty-nine years.

"What I am bound to follow," said Sir J. Stuart, V.C., "is that well-established doctrine, that where there is a gift to children as a class, then, unless there are words so clear as necessarily to apply to and include illegitimate children, or clearly to exclude any but such children, I must hold the description would include legitimate children only. Now the only circumstances in favor of this claim by the illegitimate children are these: that M. was at the date of the will aged forty-nine, and that the testatrix, when she made her will, knew that M. had children, and believed her to be the wife of B., and so describes her. All that supports the view taken by Sir

39. In *Doe d. Ashford v. Bower*,¹ the testator devised all his messuages, situated *at, in, or near* a street, called Snig Hill, in Sheffield, which he lately purchased from the Duke of Norfolk's trustees. The testator had *four* houses in a street called West Bar, about twenty yards from Snig hill, and *two* houses about 370 yards from Snig Hill, and from 390 to 399 yards from the other houses in West Bar. There were no tenements between Snig Hill and the four houses at West Bar; but the intermediate space between all the testator's houses was covered with tenements, intersected with cross streets. The testator purchased all the houses from the trustees of the Duke of Norfolk under one contract, and the whole were conveyed to him under one conveyance; the ground upon which the four houses stood was there described as situate in New Hall-street, Sheffield, and lying intermixed with ground belonging to another party; that on which the two houses stood was stated to be situate in and fronting to a certain other street in Sheffield, called Gibraltar-street. He redeemed the land-tax upon all the houses by one contract,

Thomas Plumer in *Beachcroft v. Beachcroft*, 1 Madd. 430, and of Lord Lyndhurst in *Fraser v. Pigott*, in favor of illegitimate children. But it is quite opposed to the decision of Lord Eldon, in *Harris v. Lloyd*, 1 Tur. & Russ, 310, and all other decisions on this subject, except the cases just mentioned. Here it is impossible not to see that this lady might have had legitimate children, and that her legitimate children could not, upon the construction of this will, have been excluded from participating in this gift. However improbable it was that there should be legitimate children of M., they would, if there had been any, have clearly become entitled. According to the argument for the only children of M., they, though illegitimate, would have been entitled to take equally with any such legitimate children; but this would be contrary to the rule of law." See also *James v. Smith*, 14 Sim. 216; *Meredith v. Farr*, 2 Y. & Coll. C. 525; *Owen v. Bryant*, 2 De G. M. & Gor. 697; *Worts v. Cubitt*, 19 Beav. 421; *Tugwell v. Scott*, 24 Beav. 141; 2 Jarm. Wills, 2nd ed. 193.]

¹ 3 B. & Adol. 453; and see *Doe d. Smith v. Galloway*, 5 B. & Adol. 43.

and had no other houses in Sheffield. The question in the cause was, whether the *two* houses in Gibraltar street passed under the above-mentioned devise; and the Court held that they did not. Lord Tenterden, C. J., said:—"I am of opinion that the plaintiff is entitled to judgment: the testator devises to the wife of the defendant, *All my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk or his trustees.* There are four houses answering every part of that description, and to which the defendant is clearly entitled by the will; but he also claims two houses which are at some distance, bought, indeed, from the Duke of Norfolk's trustees, like the four, but not *at or near Snig Hill.*" Littledale, J., said:—"The first part of the description, '*my messuages situate at, in, or near Snig Hill,*' applies to the four houses, and not to those now claimed. The further words, '*which I purchased of the Duke of Norfolk or his trustees,*' are merely additional description, and do not extend the effect of what precedes. Houses at or near Snig Hill would have passed by the former part of the clause, although some of them had not been bought of the Duke or his trustees, according to the rule, that, where there is sufficient certainty in description, a false reference added shall not destroy its effect."¹ Parke, J., said:—"One rule of construction is that an heir-at-law shall not be disinherited except by express words; and another, as stated by Lord Bacon, is, that if there be some land wherein *all the demonstrations in grant are true*, and some wherein part are true and part false, the words of such grant shall be intended words of true limitation to pass only those lands wherein all the circumstances are true. Here, all the circumstances are true of the four

¹ Bacon's Maxims of the Law; Comments on Reg. 13 and Reg. 24.

houses, but not so of the two; these last are not '*at, in, or near Snig Hill,*' and they are in a place bearing a different name." ¹

¹ [In *Wilson v. Squire*, 4 Y. & Coll. C. C. 654, a testator gave £1,000 Consols to "The Governor and Trustees of the London Orphan Society in the City Road."

Two Charities claimed the fund, viz. the 'Orphan Working School' in the City Road, and the 'London Orphan Asylum' at Clapton, near London. Extrinsic evidence of intention was tendered on either side.

Sir J. L. Knight Bruce, V.C., said;—"In this case the first subject of inquiry is, whether there is a body of men, or an institution, capable of answering the description given by the testator. He has given a legacy to the Governors of the London Orphan Society, in the City Road. It is clear, therefore, that it is a legitimate subject of inquiry by extrinsic evidence, whether there be a London Orphan Society in the City Road. It appears that there is in the City Road a charitable institution, conducted by a voluntary association of persons, for the purpose of educating and bringing up orphans, and apprenticing them, or fitting them for situations of labor.

It is a charitable institution for the benefit of orphans,—certainly in a particular way, but in a reasonable and not extraordinary way. No man can say, that a society so constituted is not an orphan society.

It then remains to deal with the word 'London.' The word may be used in two senses: the one strict and topographical; the other popular and general, as meaning the metropolis and the suburbs immediately adjacent.

The testator cannot have meant to use the word London in the former sense; because he, at the same time, mentions the City Road, which is admitted to be not in the city of London. The word is used by him as equivalent to metropolis. He here therefore gives to an orphan society in or near the metropolis, that is to say, in the City Road; and I find in the City Road a charitable society and institution for the benefit of orphans, in the manner already mentioned. He therefore accurately and truly describes the Orphan Working School.

It has, however, been made a question, whether there is not an ambiguity in the will raised by extrinsic evidence? If it were so, it might follow that evidence might be introduced to show what institution was intended. It is contended that there is another body of persons to which the words of the will are applicable, and the evidence which is said to support this argument is evidence showing that there is another Society, called the London Orphan Asylum, at Clapton,—Clapton being in or near Hackney; the City Road, on the contrary, where the other Society is, being in St. Luke's, Old Street. Is it possible to say, that the description which the testator uses is equally applicable to both? I apprehend that the Clapton

40. In *Richardson v. Watson*,¹ a question arose whether two closes of land passed under the word *close*. Parker, J., said,—“Generally speaking, evidence might be given to show that the testator used the word *close* in the sense which it bore in the country where the property was situate, as denoting a *farm*; but here such evidence was not admissible, because it is manifest that in this will the testator used the word *close* in its ordinary sense, as denoting an *enclosure*, for the word *close* occurs in other parts of the will.”

41. The recent case of *Doe d. Templeman v. Martin* may also be referred to as a case in point.

42. So Lord Bacon, in his comment upon his 13th Maxim, “*Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*,”—states the rule as follows:—“If I have some land wherein all those demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those land wherein all those circumstances are true.”

43. The case of *Thomas v. Thomas*,² cited in a subsequent page,⁴ should also be referred to here. It is conceived that evidence would not, in that case, have been admissible to prove that any person other than Mary Thomas or Elinor Evans was intended. The will was ambiguous in this respect only, that it did not de-

Society is not described in the will; and that, in order to satisfy the will the only question is, whether there is an Orphan Society in the City Road. I find that there is such a Society, and there is no other Charity which can properly be described by the same terms. The parol evidence, therefore has no place.” See also *Bradshaw v. Thompson*, 2 Y. & Coll. C. C. 295. In the matter of the Clergy Society, 2 Kay & Joh. 615.]

¹ 4 B. & Adol. 799 [1 Nev. & Mann. 575].

² 4 B. & Adol. 771.

³ 6 Term R. 671.

⁴ *Infra*, pl. 140.

termine *which of those two* persons was intended; the will, however inaccurate, was free from ambiguity, *to the extent of showing that one of those two persons was intended.*¹

44. The case of a devise "to one of the sons of A.," who hath several sons,² is within the reason of the proposition now under consideration. The words, although they express an indeterminate intention, are sensible as they stand,—there is no reason in such a case for *concluding* that the testator did not mean that which his words express, and the Court therefore cannot control the words, or give them a meaning they do not bear, and the devise will be void.³

45. The rule of construction contained in this proposition is applicable to those cases in which the testator's expressions, though not precise and technical, are so far accurate as to admit of no doubt as to the sense in which they were used.⁴ In other words, when a Court is once satisfied that particular words express a particular meaning, although inaccurately, it is just as much bound to adhere to that meaning, as if the most precise and technical expressions had been used. In the *Attorney-General v. Grote*,⁵ in which the language of the will was most inaccurate throughout, Sir William

¹ See cases referred to *infra*, pl. 45, n.

² 2 Vern. 625.

³ *Infra*, Proposition VI. [But a gift to all the grandchildren of the testatrix, "with the exception of one, viz. —" has been established as a gift to the class, not affected by the incomplete exception. *Illingworth v. Cooke*, 9 Hare, 37.]

⁴ *Fonnereau v. Poyntz*, 1 Bro. C. C. 471; *Stafford v. Horton*, 1 Bro. C. C. 482; *Attorney-General v. Grote*, 3 Mer. 316; *Westlake v. Westlake*, 4 B. & A. 57; *Boys v. Williams*, 3 Sim. 573, and *supra*, pl. 37. See *Thomas v. Thomas*, *supra*, pl. 43.

⁵ Appendix, No. II. [3 Mer. 316; S. C. on appeal, 2 Russ. & Myl. 699.]

Grant said, "To authorize a departure from the words of a will, it is not enough to doubt whether they were used in the sense which they properly bear. The Court ought to be quite satisfied that they were used in a different sense, and ought to be able distinctly to say what the sense is in which they were meant to be used." In the same case Lord Eldon said, "Individual belief ought not to govern the case, it must be judicial persuasion."¹

¹ In *Harwood v. Griffith*, before Sir J. L. Knight Bruce and Sir G. Turner, LL. JJ., 4 De G. M. & Gor. 700, a testatrix was possessed of four debentures of the Spanish Government, each of which bore impressed upon it the words "Capital £1,000 sterling," and professed to secure to the holder £50 per annum in perpetuity, but to be redeemable on payment in London, during the four years succeeding the date thereof, at the rate of £55 per cent., or at any subsequent period at the rate of £60 per cent. *on the nominal amount*. By her will she expressed herself as follows:—"I bequeath unto J. L. and T. B. the sum of £2,000 Spanish bonds or coupons now belonging to me, and all dividends or interest which shall be due to me thereon at the time of my decease, upon trust," etc. She afterwards disposed of the residue of her property. It was insisted, on behalf of the *cestui que trust*, that the bequest of the Spanish bonds was a complete and effectual disposition of the four above-mentioned debentures, and evidence was tendered to show that the testatrix always spoke of her debentures as for £500 each, being approximately their redeemable value, and of the four as being securities for £2,000.

Their lordships affirming the decision of Sir J. Stuart, V. C., held that two only of the debentures passed, and that extrinsic evidence as to the declarations of the testatrix with regard to her intention was admissible. "It cannot," observed Sir G. Turner, L. J., "be denied, that these debentures answer the description of Spanish debentures, and if therefore, two of them do not answer the description of "the sum of £2,000 Spanish debentures," it must be in consequence of the sum of £2,000 forming part of that description. But, if these debentures were to be described with reference to any sum of money (and this testatrix has thought proper so to describe them,) it cannot, I think, be said that a description of them as £1,000 debentures was not correct. It is true that they do not secure capital sums of £1,000, but neither on the other hand do they secure any capital sums. They could not, therefore, take their designation from any capital sums secured by them; but there is impressed upon the face of them the word "Capital £1,000," and this, I think, was quite sufficient to warrant their being described as £1,000 debentures. I am of

46. However, in the recent case of *Collison v. Girling*,¹ the Lord Chancellor (affirming the decree of the Vice-Chancellor) decided a point which, although he proposed to save whole the principle established in the former cases, appears to have much relaxed the strictness of its application. In that case a testator by his will, dated in 1832, gave to three trustees, upon certain trusts, a sum of £15,000 interest or share in the 3 per cent. Consols, to be deemed a legacy of quantity, and to be due at his decease, as if the same were a specific legacy; and he directed that if he should not die possessed of 3 per cent. Consols sufficient to satisfy the said sum of £15,000 Consols before bequeathed, then his executors should, within two months after his decease, purchase so much Annuities in that fund as should raise the money required for that purpose out of his real estate. He created a term in his real estates, one trust of which was to raise the full amount, or, as the case might require, the deficiency of the said sum of £15,000 3 per cent. Consolidated Bank Annuities, in case he should not have at the time of his decease sufficient 3 per cent. Annuities in that fund to answer that legacy. At the time of the testator's death in 1835, he had £3,000 Consols standing in his name, which had been purchased in 1834; but he had, in 1824, sold out £12,000 Consols, which then stood in his name, and paid the produce to his brother, who had mortgaged to him a freehold estate, subject to a proviso for redemption, upon retransfer into his (the testator's)

opinion, therefore, that two of these debentures correctly answer the description contained in this bequest; and there being nothing else answering to that description, I think that no further evidence can be received."]

¹ 4 Myl. & Cr. 63. [S. C. on appeal, 9 Cl. & Fin. 88. See *Essington v. Vashon*, 3 Mer. 434.]

name, when requested so to do, of £12,000 Consols, and payment of interest equal to the dividends in the meantime, and had entered into a covenant for the retransfer in the terms of the proviso. No request to retransfer the stock had been made when the testator died. The Lord Chancellor held that the £12,000 Consols secured by the mortgage passed by the will as part of the legacy of £15,000 3 per cent. Consols. His Lordship's judgment was as follows:—"The question upon this appeal is, whether a sum of £12,000 3 per cent. Consols, which the testator, at the time of making his will, was entitled to have transferred to him under an ordinary stock mortgage, is applicable to the payment of a legacy of £15,000 like stock under his will. The Vice-Chancellor's decree has declared that it is. Henry Collison, the residuary legatee, contends that it is not, but that it belongs to him as part of the residue. It appears from the mortgage deed, stated in the Master's report, that, in the year 1824, the testator was possessed of £12,000 3 per cent. Consols, which, upon the application of Nicholas Cobb Collison, was sold, and the proceeds paid to him, upon his undertaking, *at the request of the testator*, to transfer to him the like sum of £12,000 3 per cent. Consols, and in the meantime to pay to him such sums as should be equal to the dividends upon such stock. The deed then recites, that the retransfer of the stock, and the payment of sums equal to the dividends, should be secured by a mortgage of certain property of the borrower; and it proceeds accordingly to convey the property. The proviso for redemption is upon the mortgagor at the request of the mortgagee, transferring or *replacing*, or causing to be transferred or *replaced*, the stock; and until the same should be *replaced*, paying sums equal to the dividends; and the mortgagor covenants, at the request of the

mortgagee, to transfer or cause to be transferred, or replaced, into the name of the mortgagee, the said sum of stock; and to pay the dividends. It is perfectly true that the £12,000 3 per cent. Consols, which had stood in the name of the testator, passed by this transaction into other hands, and no longer existed in the possession of either the lender or the borrower; but it is equally true that transactions of this kind are treated and considered as loans of stock, and are so described; and accordingly the mortgage deed in this, as in other such cases, speaks of *retransferring* and *replacing* the said sum of stock, whereas, in fact, the right of the mortgagee and the obligation of the mortgagor is that a certain new portion of stock should be transferred, or procured to be transferred, by the mortgagor into the name of the mortgagee; but as the arrangement secures to the mortgagee precisely the same amount of pecuniary value, and, upon being completed, will leave him in possession of property, not identically what he had before, but in every other respect the same in specie and value, he naturally considers that he has not parted with but only lent his stock; and so considering it scarcely does more violence to the accuracy of language than in speaking of any sum of money lent as the lender's money, as he never expects to receive back precisely the money he advanced, but money of equal value and amount. In considering the terms of the will, upon which the question turns, the testator must be considered, either as the lender of stock, and therefore the owner of it, as a lending does not change the property in the thing lent, in which case there would be no difficulty, or at all events, as entitled by contract to have transferred into his name a certain amount of the stock; and it does not appear to me to be very material which supposition is adopted. The will is

dated in 1832, and the testator in the first place gives £15,000 interest or share in the 3 per cent. Consols, which he directs shall be deemed a legacy of quantity, upon certain trusts: then, after disposing of an existing sum in the $3\frac{1}{2}$ per cents., he gives £3,400 3 per cent. Reduced Annuities, which he also directs shall be deemed a legacy of quantity, upon certain other trusts. In a subsequent part of his will he directs, that if he should not *die possessed* of 3 per cent. Consols, and 3 per cent. Reduced sufficient from one or both of those funds to answer and satisfy the said sum of £15,000 3 per cent. Consols, and £3,400 3 per cent. Reduced, then his executors shall purchase so much as will make up the deficiency, and the money necessary for that purpose he directs shall be raised out of his real estate, and creates a term of years for that purpose; and in declaring the trusts of the term, he directs that there shall be raised the full amount or, as the case may require, the deficiency of the said sum of £15,000 3 per cent. Consols, and £3,400 Reduced 3 per cent. Annuities, "in case I shall not have, at the time of my decease, as aforesaid, sufficient 3 per cent. Annuities in both or either of those funds to answer both those legacies." By the residuary clause he gives to the appellant all the residue of his personal estate and effects whatsoever and wheresoever, except the 3 per cent. Consols, 3 per cent. Reduced, and $3\frac{1}{2}$ per cent. Annuities. It appears, by the report, that the testator, in 1834, purchased £3,000 3 per cent. Consols, so that with the £12,000 the £15,000 3 per cent. Consols would be made up; and there is no question but that the legatees of the £15,000 3 per cent. Consols are entitled to have that sum realized either by the purchase out of the general estate or by application of the £12,000; but the residuary legatee insists that the

£12,000 3 per cents. due upon the mortgage passed to him under the residuary clause, and that that amount of stock is to be purchased for the legatees by means of money to be raised out of the real estate. Such could not have been the testator's intention. If the covenant in the mortgage deed had been performed, and the stock replaced, the question could not have arisen; and it is not possible to suppose that the testator intended the title of his devisee and residuary legatee to the value of such stock to depend upon the fact or the accident of such transfer being or not being made. *But the question is, are there words in the will to enable the Court to give effect to what must be supposed to have been the testator's intention.*¹ If the testator considered himself, as per-

¹ [No supposition, as to what may have been a testator's intention while writing his will, ought, it is submitted, to be based upon the subsequent course of events. *A fortiori*, no such supposition can affect the construction of what he actually wrote. The Courts are not only theoretically, but morally, in the dark with regard to his motives and intention, except as expressed by him in his written will.

"No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise, or the good. A testator is permitted to be capricious and improvident, and is moreover at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious, and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily. And this is one among the reasons that may be, and have been, judicially given against readily attributing to men mistakes in the language that they use in their wills, and against departing from the proper sense of their words without something more than conjecture; without something more than the mere opinion of the interpreter, however wise he may be, that the language construed according to the rules of idiom would make an eccentric or inconvenient provision,—reasons which may not always have been adhered to, which may possibly be at variance with some particular instances of construction now of settled application in some particular cases, but which are generally true and sound."—Per Sir J. L. Knight Bruce, in *Bird v. Luckie*, 8 Hare, 306; and see the observations of the same learned Judge in *Hart v. Tulk*, 2 De G. M. & Gor. 313; of Sir James Wigram, V. C., in

sons in his situation usually do, as having lent the stock, and therefore as being still owner of it, the expression used in the will would accurately describe what, upon that supposition, he must have considered as his title and interest in the stock; and there is, I think, strong ground, from the expressions of the mortgage deed, for concluding that such was his understanding of his situation with relation to the stock; but if the transaction be considered with the utmost technical accuracy, the testator, when he made his will, held a contract under which he was entitled at any time to require the transfer into his name of £12,000 3 per cent. Consols, and in the meantime he had all the benefit which could arise from the fund if actually transferred. As against the other party to the contract, he had no right except to such transfer: he had no demand for any money: such party was not bound to pay him any, but might have discharged himself from the obligation by making the transfer. If his interest under such contract be not accurately described as stock of which he was possessed, or which he *had*, which are the expressions used, is it more accurately described as personal estate excepting 3 per cent. Consols? for such are the terms of the residuary clause, and it is between those two gifts that the contest lies. If a testator, having contracted for the purchase of a large quantity of wool, should make his will bequeathing to one person all his personal estate except his wool, and to another all his wool, could there be any question as to the title to the wool so contracted for, although the party contracting to sell had it not himself, but had to procure it to

Hilliersdon v. Lowe, 2 Hare, 355, and of Lord Brougham in *Doe v. Winter v. Perratt*, 6 M. & Gr. 371.]

enable him to fulfil his contract? What a party is entitled to under a contract he considers as his own. Lands contracted for will pass by a general devise of all the testator's lands, and of all the lands purchased by him, although he had other lands purchased and actually conveyed: *Atcherley v. Vernon*.¹ Why, then, if a testator contract for the purchase and transfer of a particular description of stock, and then bequeaths all he possesses or has of such stock, is it not to pass? The words of this will would clearly have passed stock standing in the names of trustees for the testator, and yet he would not have possessed or had the stock, in the sense contended for by the appellant; but the words would be construed to include stock to which he was entitled; and if so, the testator in this case was also entitled to the stock. I am, for these reasons, of opinion that the £12,000 3 per cent. Consols, secured by the mortgage, is well bequeathed to make up the legacy of £15,000 3 per cent. Consols; and that the Vice-Chancellor's decree is right; and that this appeal must be dismissed with costs." As this case is under appeal to the House of Lords, the author abstains from making any remarks upon it.²

¹ 10 Mod. 518.

² In this case instructions were laid before counsel to prove by the declarations of the testator that he did not intend the £12,000 stock, secured by the mortgage, to pass as part of the £15,000 Consols. The interrogatories were not drawn, because the evidence was properly considered by counsel to be inadmissible.

[The above decree was affirmed on appeal, 9 Cl. & Fin. 88; S. C. 6 Jur. 673. Lord Lyndhurst, C., in giving judgment, said, after referring to the general circumstances of the case:—"The facts as to the state of the property were these:—The testator had purchased, some time before his death, £3,000 3 per cent. Consols; he had, before that period, a sum of £12,000 3 per cent. Consols; he had lent that £12,000 3 per cent. Consols to a relation of his, upon condition that that sum of Consols should be re-transferred and replaced at his request; and that, in the meantime, a sum equal to the dividends, and payable at the time that the dividends were payable, should be paid to him. Now, my opinion is, that having this

47. Opposed to the strong current of cases last re-

property at the time of his death,—namely, the £3,000 3 per cent. Consols, and being entitled, as I consider him entitled, to the other £12,000 3 per cent. Consols,—he had, within the meaning of this bequest, at the time of his death, £15,000 3 per cent. Consols, and that they would satisfy the terms of the legacy. Under such circumstances, I consider that the judgment of the Court below was right.

Lord Campbell, in expressing his concurrence with the above opinion, observed :—“It seems to me to be in conformity with the principle well established on the subject, and in accordance with all the decisions; and I think it would be most formidable if it were to be supposed that we are departing from the principle that you cannot admit extrinsic evidence to show the sense in which a testator used any particular expression. I disclaim all intention of any such departure on this occasion. On the contrary, I have looked to the will; I have put an interpretation on it; and I apprehend that, according to the just interpretation of that will, stock which the testator does possess under the circumstances which are here proved, would be ‘possessed’ by him at the time of his death.

“Then the reference is merely to inquire whether he had any such stock; and it is not at all to put an interpretation on the will, but to apply the language of the will. I apprehend that, according to common parlance, not putting any strained or secondary meaning on the language of the will, the testator may be supposed to say, that he is possessed of stock, which he held under the name of stock. ‘Possessed’ is a very flexible word. ‘All that I die possessed of,’ would be all the personal property which I have. ‘All the stock which I die possessed of,’ would be stock which I may have lent, and which is to be restored to me in consequence of a contract which I may have entered into; and it is a matter which cannot depend, I think, on the remedy, and upon whether a Court of Equity would decree a specific performance or not. It is admitted, that if it were a horse, or anything of that sort, that was the subject of the contract, the testator might be considered in possession of it; but even in that case the remedy would only be damages, to be raised from his lands in respect of a breach of the contract. It seems to me, therefore, that the view taken of the case by the Vice-Chancellor and by the late Lord Chancellor was perfectly correct.”

The Courts, in this case, having professed to be governed by the principles enunciated by the learned author, it may be permissible, with unfeigned respect for the high authorities by which it was decided, to commend it to the careful consideration of the reader.

It is clear that there was nothing in the context of Mr. Collison’s will, from which it was apparent that he had used the words “die possessed of” in any other than their strict and primary sense, and that his words, however strictly interpreted, were sensible with reference to extrinsic circumstances. The strict and primary sense of the above words was

ferred to, stand the case of *Druce v. Dennison*,¹ and the cases upon the authority of which that case was decided.

48. In the case of *Druce v. Dennison* it was held, that, for the specific purpose of raising a case of *election*, extrinsic evidence was admissible to prove that the testator, by the words "my personal estate," meant personal estate subject to a power; and the case is referred to in support of that proposition, in a work of the first celebrity.²

49. It may be questioned, however, whether Lord Eldon has not since repudiated the decision attributed to him by the report of that case in *Vesey*.³ The case, at all events, applies to cases of election only. It will probably be followed in Courts of equity of original jurisdiction, but will not, it is hoped, be supported by the Court of last resort, if the point should ever call for determination there. The point is not of that nature which sometimes requires that a common error should be perpetuated.⁴

therefore the only sense in which they could legitimately be adopted by the Court. Was the testator, in any such sense, *possessed* of the £12,000 Consols at the date of his death? In fact, the £12,000 was sold and dispersed, the only bargain being, that the mortgage should some day go into the market and buy stock, in the name of his mortgagee, to an equivalent amount. Fully admitting the flexibility of the word in question, might not this very case be cited as an instance of its primary and secondary use, if indeed it be necessary to concede that the testator was, in any correct sense, possessed of the £12,000?

¹ 6 Ves. 385.

² Sugden on Powers, p. 385, 3rd edit. [Vol. ii. p. 349, 7th ed.]

³ See per Lord Eldon in *Doe d. Oxenden v. Chichester*, 4 Dow, 65; and see *Blommart v. Player*, 2 Sim. & Stu. 597; and *Dummer v. Pitcher*, 2 Myl. & K. 262. [*Shuttleworth v. Greaves*, 4 Myl. & Cr. 37; *Maxwell v. Maxwell*, 16 Beav. 112; *Clementson v. Gandy*, *infra*, pl. 122; 1 Jarm. Wills. 2nd ed. 377.]

⁴ [The doctrine of election may be thus illustrated:—

[Suppose a testator to include in a devise to B. property which really

50. The only positive exception to the Second Proposition, of which the writer is aware, exists in those cases in which a testator, *having no children*, devises property in default or failure of issue of *himself*; in which case the words, *in default of issue*, or *failure of issue*, contrary to their strict legal meaning, have been construed to mean issue *living at the death of the tes-*

belongs to C., upon whom, by the same instrument, he confers a benefit. Equity will, in certain cases, compel C. to elect to take either under or against the will, *i. e.* either to fulfil the testator's intention with regard to B., or to relinquish, in B.'s favor, the benefit intended for himself. The question frequently arises, whether or no the devise to B. was really designed by the testator to include anything belonging to C. (*vide e. gr.* Ellis v. Ellis, 3 Hare, 110; Jervoise v. Jervoise, 17 Beav. 566; Swan v. Holmes, 19 Beav. 471; Maxwell v. Maxwell, 2 De G. M. & Gor. 705.) In such cases, both upon principle and authority, extrinsic evidence of what the testator intended, as distinguished from what his words express, is admissible. But C. may, it is conceived, resist election by proving, if he can, that the disposition of his property, expressed upon the face of the will, is *not the will of the testator*. See *infra*, pl. 152.

In connection with the subject of election, that of satisfaction may be here adverted to, with the remark that the subject of this volume should be carefully distinguished from a class of cases with which it is sometimes confounded, *i. e.* cases in which extrinsic evidence is admitted to rebut or support a legal presumption. This is, obviously, a very different matter from admitting such evidence to prove with what intention particular words were employed by a testator. In point of fact, the legal presumption above referred to, does not arise until after the meaning of the testator's words has been determined. It arises upon his words properly interpreted. The common cases of a devise or bequest by a debtor to his creditor, or by a parent, or one *in loco parentis*, to a child whom he has previously undertaken to portion, will occur to the reader. In such cases, the presumption of law, arising from what the testator has actually done, may be repelled by evidence showing the intention with which he did it. And extrinsic evidence adduced for this purpose, may be replied to by like testimony advanced in support of the presumption. See, generally, as to the admissibility and office of extrinsic evidence with reference to the purposes just adverted to: Wallace v. Pomfret, 11 Ves. 542; Weall v. Rice, 2 Russ. & Myl. 251; Kirk v. Eddowes, 3 Hare, 509; Exparte Pye, 18 Ves. 140; S. C. 2 White & Tudor's Leading Cas. 262, and the notes thereon; Williams on Executors, part III. book 3, sect. viii.

tator.¹ These cases are always spoken of as anomalies.

[Unless the words of a will are ambiguous in some respect, parol evidence is wholly excluded.² It may be added to this statement that, unless the ambiguity also relates to the subject or object, parol evidence is inadmissible, even to the extent warranted by propositions 3 and 5.

[The main reason perhaps, why, parol evidence is not admitted to explain an ambiguity under a will, so far as the words of disposition are concerned, is, that there is no equity in such cases between the devisee and the heir, just as there is no equity between the heir and next of kin on a disputed or doubtful case of a direction to convert.³

[The motive for applying parol evidence in aid of the construction is to prevent the words receiving their primary signification. The parol evidence is allowable for the purpose mentioned, as is shown under Proposition 3, if the gift according to the primary sense of its terms is void as insensible. But, if it can have any, even the least, operation according to its primary signification, it will never be interpreted in any other way. Therefore, before adducing parol evidence, the preliminary question must be disposed of, "has the gift any force according to the primary sense of the terms of bequest." If it has, or can, by possibility, have such operation, parol evidence is inadmissible.

[Parol evidence,⁴ therefore, is not admissible to show that a

¹ *French v. Caddell*, 3 Bro. P. C. 257; *Wellington v. Wellington*, 4 Burr. 2165; S. C. 1 Blacks, 645; *Lytton v. Lytton*, 4 Bro. C. C. 441; *Jones v. Morgan*, 1 Bro. C. C. 206; *Sandford v. Irby*, 3 B. & A. 654. [*Doe v. Lucraft*, 1 M. & Sc. 573; 8 Bing. 386; *Egerton v. Jones*, 3 Sim. 409; *Rye's Settlement*, 10 Hare, 106; 2 Jarm. Wills, 2nd ed. pp. 426 et. seq. The 7th Wm. 4 & 1 Vict. c. 26, s. 29, has, with reference to wills executed or republished on or after the 1st of January, 1838, placed this exception which was originally admitted by the Courts in deference to the evident intention of the testator) under the protection of positive law. See the observations on this section in the volume just referred to, pp. 453 et seq.]

² Tamlyn on Evidence, pp. 228, 234; *Hampshire v. Pierce*, 2 Ves. Sen. 216.

³ *Wright v. Trustees of Meth. Episcop. Ch.*, 1 Hoff., 203.

gift by will¹ was intended to be an execution of a power, even though the sum bequeathed is the amount subject to the power, and the testator has no other property. The reason appears to be that the ambiguity in such cases relates to the words of disposition rather than to the subject of the testator's power, since he may at his death have personalty. Accordingly, neither the coverture nor the infancy of devisees can effect the question whether, they take beneficially, or a mere legal estate. The question is wholly one of construction.² There is a possibility that the feme covert may become discover, and that the infant may reach maturity. The terms of the will, being thus sensible in their primary signification, can receive no secondary construction.

[*Pari ratione*, though a bequest to one, his executors, etc., may lapse, parol evidence is not admissible to show that the testator used the word executor as a term of purchase and not of legal devolution, and for the purpose of preventing a total lapse.³

[It may be considered as certain that a devise of an estate described as of a certain county or parish will not be extended to lands outside of the county, parish, or district specified, if the devise can operate on any property within the district mentioned.⁴ The addition, however, of the words "appurtenances," "thereunto belonging," &c., may possibly be deemed to extend the meaning more than if the same words were contained in a deed.⁵ But the case of *Anstee v. Nelms*⁶ was decided on special grounds, and does not conflict with the rule in *Doe d. Browne v. Greening*, &c.

[It has been held in *Allan v. Vanmeter*,⁷ that the meaning of terms in a will may be explained by parol, and no distinction is taken between those cases where the primary meaning of the terms is sensible and those where it is not, with reference to the circumstances of the testator. But, this case can-

¹ See *Standen v. Standen*, 2 Ves. Jun. 589.

² 2 You. & Cal., 248.

³ *Comfort v. Mather*, 2 W. & S. 450.

⁴ *Doe d. Browne v. Greening*, 3 M. & Sel. 171; *Doe d. Tyrrell v. Lyford*, 4 M. & Sel. 550.

⁵ *Doe d. Gore v. Langton*, 2 Barn. & Ad. 680.

⁶ *Ante*, p. 73.

⁷ 1 Met. Ky. 264.

not be considered as having any authority except in precisely similar circumstances to those adjudicated upon in it.

[Evidence even of the testator's intent has been received in some States, on the ground of explaining, but not qualifying, the terms in the will—a distinction correctly described by Judge Redfield¹ as unintelligible.² It is doubtful whether *Doyal v. Smith* is law at the present day, or would be followed in any of the States.

[Indeed, in the case of *Betts v. Jackson*,³ parol evidence was excluded of the state of the circumstances of the testator's children, although such evidence, *semble*, would have been admitted in most other States. On the other hand, in the case of *Pool v. Pool*,⁴ evidence was admitted to show the circumstances of a legatee where the text of the will was quite sensible, with reference to surrounding circumstances.

[Extrinsic evidence is not allowable to prove that the testator on the particular occasion used a phrase or word in any sense different from its strict and primary import,⁵ unless the meaning of the terms in the will is insensible with reference to the circumstances. This is the case of *Doe d. Brown v. Brown*.⁶ Under a devise of copyholds, it was held that freeholds could not pass, since the testator had copyholds which could satisfy the terms of the devise. The testator had freeholds conveyed to him by the designation of copyholds. Yet, the devise was not extended to these. If, however, the testator had no copyholds, then evidence would, according to Sir J. Wigan's third proposition, be admissible to show that freeholds were regarded by the testator as copyholds.

[Parol evidence, in short, is never admitted except from necessity. If the will is sensible with reference to extrinsic circumstances, no fulcrum is afforded for the adduction of parol testimony.⁷ If the primary meaning of the whole will does not square with the facts, then a secondary meaning will be adopted, to suit any phase of the testator's circumstances, or

¹ 2 vol. 47.

² *Doyal v. Smith*, 28 Ga. 262; but, see *Leigh v. Savidge*, 1 McCarter, 124; *Hearn v. Ross*, 4 Harring, 46.

³ 6 Wendell.

⁴ 33 Ala., 145.

⁵ 2 Jarm. 359.

⁶ 11 East, 441.

⁷ *Doe d. Westlake*, 4 B. & Ald., 57.

any hypotheses of his intention, in the order of their probability, as determined by the construction.¹ Therefore, if a bequest suits one person more than another, parol evidence is not always admissible in England, but is in America. See *Horwood v. Griffith*; ² *Delmare v. Robello*.³ If no correllation or apposition of the testator's circumstances will fit any of the various secondary constructions tried hypothetically by the Court, more than some other subject or object, then, and then only, is parol evidence of the testator's intentions admissible.⁴

[With respect to cases like that last referred to, when the description in the will suits one person more than another, and neither perfectly, it is doubtful whether parol evidence of the testator's intention would not be received here, except some time-honored rule of construction stood in the way and determined or defined the person. Indeed, the maxims *veritas nominis* and *falsa demonstratio* were doubtless intended to raise conclusive, and not disputable, presumptions, to be themselves the sport of *any* parol evidence.

* [In *Doe d. Chichester v. Oxenden*,⁵ every word of the clause in question could operate according to its primary meaning, without recourse to a secondary sense. Such a sense, therefore, or parol evidence thereof, could not be entertained by the Court. This and similar cases are plainly distinguishable from those where parol evidence was received. In the latter class of decisions, the phrases under review would have been *wholly* inoperative but for the aid of parol.

[When the words of the will can operate in the natural sense or by construction aided by the maxims "*falsa demonstratio*," "*error nominis*," etc., evidence cannot be received of facts showing a probability that the testator intended a peculiar use of the terms. For instance, in *Doe d. Tyrrell v. Lyford*, the testator devised lands "at Sutton Wick, in the parish of Sutton Courtney, which he purchased of S." The Court rejected extrinsic evidence to prove that the testator intended to

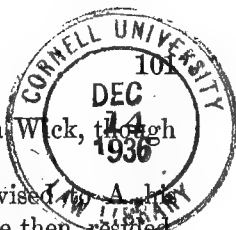
¹ *Jeffries v. Mitchell*, 20 Beav. 15; 1 Jarman, 404.

² 4 De G. M. & G., 708.

³ 1 Ves. Jr., 412; *Hart v. Marks*, 4 Brad. Sur. 161.

⁴ See *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 263, *post*, pl. 183.

⁵ 3 Taunt, 147, *ante*, pl. 34.



include other lands not in the parish of Sutton Wick, the high part of the land purchased of S.¹

[In *Doe d. Preedy v. Holtom*, a testator devised to A. his messuage or tenement, in Swalcliffe, wherein he then resided, with the offices, outhouses, barns, stables, and other edifices and buildings, yards and gardens to the same adjoining, and all, the several closes or enclosed grounds, pieces and parcels of ground called and known by the names of "Cow-house," &c., with the appurtenances, part of the farm and lands then in his own occupation. He then devised to B. all other his hereditaments in Swalcliffe (except what he had before devised to A.). The question was whether the devise to A. comprised two cottages adjoining the messuage, where the testator resided, and which he had separated therefrom by a stone wall, and let off to tenants. It was held that the cottages passed to A., and that parol evidence that the testator intended to devise them to B. was inadmissible.²

[As a devise to the children of a living person as a class will comprise all born previously to the testator's death, proof that the propositus had no children at the date of the will is inadmissible as irrelevant. For he might have had children before testator's death. The devise, therefore, is capable of operating according to the primary signification of the terms, and, consequently, an illegitimate child of the propositus, though born at the date of the will, is incapable of taking under the devise.

[In short, wherever a clause is construed not according to the primary meaning of the terms used, there must be an absolute impossibility of so applying it. *Ut res magis valeat*, therefore, it is interpreted in some other way.

[The same rules as to the admissibility of extrinsic evidence prevail in general throughout the States.³

[In New York, it has been repeatedly decided that extrinsic evidence is inadmissible to influence the interpretation of a will the language of which is clear.⁴

¹ 4 Mau. & S., 171.

² 5 Nev. & M. 391.

³ *Johnson v. Johnson*, 32 Ala, 637; *Jackson v. Payne*, 2 Met. (Ky.) 567.

⁴ *Bunner v. Storm*, 1 Sandf. ch. 357; *Wolfe v. Van Nostrand*, 2 N. Y. (2 Comst.) 436.

[It was held, in *Brearly v. Brearly*,¹ that when the intention of a testator is sensible with reference to surrounding circumstances, neither his situation nor that of his property will affect the construction of the will.

[The case of *Grant v. Grant*² is open to some serious difficulties. The terms of the will were, in their primary signification, sensible with reference to surrounding circumstances. Why then should parol evidence be admitted at all in aid of the construction? Even supposing that the testator's intention will otherwise be defeated, that is not the question. But *non constat* that the testator did not mean what he said. He might have taken professional advice as to the effect of a disposition to his nephew, and, wishing to conciliate his wife and render her attentive to him during his last illness, made an ambiguous will, which he hoped would be secure in the bosom of the law, and not in that of parol evidence. Of course, if a word has several different primary meanings, the question is different. But, certainly, until the decision referred to, a "nephew" was not supposed to comprise a relation by affinity.

[A patent ambiguity or contradiction in terms may, sometimes, be rendered innocuous by construction, though never by parol evidence.³

¹ 1 Stockt., (N. Y.) 21.

² 39 L. J. R. N. S., 272; Alb. Law Journ. vol. 3, p. 265.

³ See *Lathrop v. Blake*, 3 Foster, 46.

PROPOSITION III.

Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible,¹ with reference to extrinsic circumstances, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

51. This Proposition is proved by the cases incidentally referred to, in considering the Second Proposition.² The most striking examples, perhaps, are those in which a popular or secondary interpretation has been put on the words *child*, *son*, and *my estate*, and other similar cases. Thus, the word *child*, though in strict construction it means a *legitimate* offspring, may be applied to an *illegitimate* offspring where the circumstances of the case make it impossible that the testator (who must have had some meaning) used it in such a strict and primary sense.³

¹ The word 'insensible,' as here used, is a word of art, which the reader will find in common use in reported cases.

² Supra, pl. 24 et seq.

³ *Wilkinson v. Adam*, 1 Ves. & B. 422; [*Warner v. Warner*, 15 Jur. 141;] *Woodhouselee v. Dalrymple*, 2 Mer. 419; *Beachcroft v. Beachcroft*, 1 Madd. 430; *Bayley v. Snelham*, 1 Sim. & Stu. 78. [See observations on this case, 2 Jarm. Wills, 2nd ed. 198; *Earl of Orford v. Churchill*, 3 Ves. & B. 69; *Pratt v. Mathew*, 22 Beav. 328.]

52. So, *son* means an immediate descendant: where, however, with reference to extrinsic facts, it is *impossible* that the word can have been used in such its proper sense, that construction of the word is, of absolute necessity, excluded; and the necessary inference, that the testator used the word in some improper or inaccurate sense, lets in the inquiry, in what sense the testator used it.¹

53. So, property subject to a power is not, strictly speaking, *his* by whom the power is to be exercised. Now, suppose a testator having no real estate at the time of making his will, but having a power over the real estate of another, to devise *his* real estate over to A. Every devise of real estate being specific, the facts of such a case would exclude the presumption that the testator had used the word *his* in its proper sense, and would let in the secondary and only other interpretation of which the word under the circumstances is capable.²

54. Other analogous cases might be cited.³

55. In *Gill v. Shelley*, Rolls, 28th January, 1831,⁴ Elizabeth Merricks gave the residue of her real and personal estate to her husband, James Mericks, for life, and directed, that after his death the residue should be divided amongst certain classes of persons mentioned in her will, and added, "amongst whom I include the *children* of the *late* Mary Gladman." Elizabeth Merricks died in the year 1817, and James Merricks died in the year 1820. The bill was filed by the trustees under the

¹ *Steede v. Berrier*, 1 Freem. 292 & 477; 8 Vin. Abr. 310, pl. 9.

² (See ante, pl. 26, note) *Lewis v. Llewellyn*, 1 Turn. 104; *Napier v. Napier*, 1 Sim. 28; Sugden on Powers, chap. v. sect. 56, n.

³ *Reeves v. Brymer*, 4 Ves. 692, and the cases there referred to; *Wilde's case*, 6 Rep. 16; 8 Vin. Abr. 310, pl. 7.

⁴ (2 Russ. & Myl. 336.)

will of Elizabeth Merricks praying the directions of the Court in distributing the residue of her estate. The defendant, Charlotte Shelley, was an illegitimate child of Mary Gladman, born before marriage, and claimed a part of the residue as a person described in the will under the words "*children of the late Mary Gladman.*" The claim of Charlotte Shelley was opposed by the personal representatives of James Gladman, deceased, who was the *only legitimate child* born of Mary Gladman. It was stated in the answer of Charlotte Shelley, and proved by the witnesses in the cause, that she was born before the marriage of Mary Gladman, and that the facts of her birth and illegitimacy, and of the subsequent marriage of her mother, and of the birth of James Gladman, and that Mary Gladman had but *one* legitimate child, were all known to the testatrix, who was on terms of intimacy with Mary Gladman from a period before the marriage until her death, and clothed and maintained Charlotte Shelley. Mr. Pemberton and Mr. Wigram, for Charlotte Shelley, cited *Woodhouslee v. Dalrymple*, 2 Mer. 419, and contended that, as no state of circumstances existed before or at the date of the will, or could possibly arise after the date of the will, with reference to which the testatrix could have used the word "*children*" in its proper sense, the Court must look into the circumstances of the testatrix's family, and see whether any person had, by reputation, gained the name of a child of Mary Gladman, as otherwise the word "*children*" in the will could not be satisfied. Mr. Bacon, for the representatives of James Gladman, cited *Wilkinson v. Adam*, 1 Ves. & B. 422; *Swaine v. Kennerley*, ib. 471; and *Hart v. Durand*, 3 Anst. 684; and contended, upon the authority of those cases, that legitimate and illegitimate children could not take together under

the general description of children. Mr. Pemberton, in reply, said, that the rule that children and illegitimate children could not take together under the general description of children, applied only to cases in which the word was used to describe a class, and not where (as in the case before the Court) the word clearly described particular individuals; that if, in *Wilkinson v. Adam*, the testator had survived his wife and married Ann Lewis, the legitimate children of that marriage would have taken jointly with the illegitimate children in whose favor the cause was decided; 1 Ves. & B. 454; that *Swaine v. Kennerley* was distinguishable from the case before the Court, because it did not appear that in that case the facts were known to the testator; and that *Hart v. Durand* did not apply, because the evidence in that case was tendered to prove *the testator's intention* to comprehend illegitimate children. The Master of the Rolls said, that if *Swaine v. Kennerley* and *Hart v. Durand* had not been distinguishable from the case before him, he should have felt no hesitation in overruling them: and decreed that Charlotte Shelley, *though illegitimate*, was entitled to share in the residue of the testatrix's estate jointly with the representative of James Gladman.¹

[Parol evidence is inadmissible to contradict or vary a statement in any written document that is sensible in the primary signification of its terms, or to impose on it a sense which its terms do not imply.² Neither is parol evidence admissible to explain or control the legal operation of such a document or of the intent of the parties in entering into it.³ So far as the con-

¹ [See *Dover v. Alexander*, 2 Hare, 283; *Leigh v. Byron*, 1 Sm. & Gif 486.]

² *Faro v. Maisteller*, 2 Cranch, 10; *McCulloch v. Girard*, 4 Wash. C. Ct 289; *vide Abbotts' Nat. Dig.* 2 vol. p. 339, *et seq.*

³ *Kemmil v. Wilson*, 4 Wash. C. Ct. 308; *Troy Iron & Nail Factory v. Corning*, 1 Blatchf. 467; *Auld v. Hepburn*, 1 Cranch C. Ct. 123.

struction is concerned, the last position stated is strictly true. Neither can evidence of this intent be advanced for any other purpose, as, for instance, in a criminal proceeding for a libel, although evidence may be forthcoming in such a proceeding of an avowed intent to write a libel of a gross nature. Such evidence is irrelevant as regards the particular libel before the court, and can only be adduced on a charge of conspiracy or an attempt to provoke to a breach of the peace, or on some other crime not founded solely on the document.

[Prior conversations are also inadmissible in aid of the construction.¹ Even secondary evidence of a document can only relate to its terms and not to parol variations of it.²

[A document, however, does not preclude parol evidence to explain or corroborate a fact referred to in the instrument, unless the evidence is offered in aid of the construction. Hence all latent ambiguities, as they relate to external facts, may be cleared up by parol,³ and hence, also, the adeption or satisfaction of legacies, if referred to ambiguously in a codicil, is open to explanation by parol.

[When once a latent ambiguity exists, parol evidence is admitted to explain all the circumstances connected with it.⁴ Therefore, all evidence relating to a custom of any kind of trade,⁵ trade-marks, usages, entries, or abbreviations,⁶ is admissible when the ambiguity is occasioned by a reference to such.

[In *Gray v. Harper*,⁷ conversations between parties at the time of the making of the contract in question, were held to be provable, in order to show that the parties used the terms in the

¹ *Hunt v. Rousmanier*, 8 Wheat. 174; *Gilpins v. Consequa*, Pet. C. Ct. 85.

² *Tayloe v. Riggs*, 1 Pet. 591; reversing, 2 Cranch C. Ct. 687; *Keene v. Meade*, 3 Pet. 1, 7; affirming s. c. *sub nom.* *Meade v. Keane*, 3 Cranch C. Ct. 51.

³ *Atkinson v. Cummins*, 9 How. 479, 486; 8 Bingh. 244; *Bradley v. Washington, &c. Steam Packet Co.*, 13 Pet. 89; reversing, 5 Cranch C. Ct. 393; *Peisch v. Dickson*, 1 Mas. 9; *Pomeroy v. Manin*, 2 Paine, 476.

⁴ *Peisch v. Dickson*, 1 Mas. 9.

⁵ *Bradley v. Washington, &c. Steam Packet Co.*, 13 Pet. 89.

⁶ *Salmon Falls Co. v. Goddard*, 14 How. 446.

⁷ 1 Story C. Ct. 574.

written contract in a peculiar sense. The evidence is allowable in wills only in cases under propositions four and seven.

[Writings, to be read together, in the United States, need not in terms refer to each other.¹ *Semble*, the reference to an external document in the case of a will stands on the same footing, even though the document is unattested.

[Legal presumptions are deemed to be of the nature of latent ambiguities, so far as to admit of parol proof of facts to rebut or prove them.

[In cases of fraud, in like manner,² parol evidence is admissible to prove or rebut the charge of fraud.³

[The identity of parties to a deed is provable to the jury by parol,⁴ so may the actual delivery be thus proved, even though the testimony vary from the date alleged in the deed.⁵ The admission of parol evidence with respect to identifying the subject or object of a gift, is, in theory, really founded on the fact that the subject and object of a gift, as well as of a contract, are part of the *res gestæ*.

[A perfect description of the subject or object is not necessary. All that the court requires is such a specification as will acquaint it of the testator's intention.⁶ It will then reject any erroneous additions, as surplusage or false demonstration. This is very readily done in the case of corporations whose long names are apt to be mistaken. But, if the name is wholly erroneous, and is not a pet or nick-name, the gift is usually void.⁷

[The case of *Thomas v. Stevens*⁸ was very like that of *Beaumont v. Fell*.⁹ The bequest was to Cornelia Thompson. Caroline Thomas was held entitled to it on parol evidence that she was the person intended.

[The nature of a testamentary disposition requires that it

¹ *Rutland & Burlington R. R. Co. v. Crocker*, 29 Vt. 549; see *Bell v. Bruen*, 1 How. 169.

² *Susquehanna Bridge & Bank Co. v. Evans*, 4 Wash. C. Ct. 480.

³ *Bottomley v. United States*, 1 Story C. Ct. 135, 152.

⁴ *Dunn v. Gaines*, 1 McLean, 321.

⁵ *Mayburry v. Brien*, 15 Pet. 21.

⁶ *Stevens v. Powys*, 1 De G. & J. 24.

⁷ *Andrews v. Dobson*, 1 Cox, 425.

⁸ 4 John Ch. 607. See *Conolly v. Paroon*, 1 Paige, 291; *Trustees v. Peaslee*, 15 N. Hamp. 317.

⁹ 2 P. Wms. 140.

should not be construed with the strictness appropriate to contracts. This view of the case probably suggested to the ecclesiastical courts originally the expediency of giving probate to wills where the testator, being *in extremis*, was unable to articulate distinctly, but yet sufficiently indicated his intention. Any such intimation is not deprived by the statute of frauds of its original efficacy. There is, therefore, real ground for the doctrine in *Beaumont v. Fell*,¹ that imperfect descriptions of a legatee are more easily remedied by parol than similar defects in devises of realty.

[But, it may be asked when the statute of wills allowed devises to be made of land, was not realty thus subjected to the same latitude of testamentary construction as personalty previously was? This view of the case is arguable, but does not affect the doctrine that the statutory requisitions as to wills of personalty made no change in the latitude of designation previously allowed to bequests. That such latitude existed is probable in the very highest degree, being so spoken of in the cases from the earliest date down to the present time, while, from the contrast pointed out between bequests and devises, it seems probable that devises of trust estates were more strictly construed, in Chancery, than bequests of personalty were by the ecclesiastical courts.

[A will that is found to contain an erroneous description of the testator's property, or of the objects of his bounty, may be compared to the key of a bureau presented as a *donatio mortis causâ*, but which is found not to fit the lock of the particular bureau described by the testator. If it does open the drawer specified, no parol evidence can be received to the effect that the testator's words do not exactly indicate his intention. But, if it is not the key of the article mentioned by him, but is the key of another similar one belonging to the testator, the courts would, as a rule, hold that the error of the testator related to the bureau and not to the key which he had before his eyes. The *escritoire*, therefore, which the key would unlock, would be deemed to be the one intended by the testator. If there were a dozen others, however, belonging to the testator, all of which could be opened by the key, then, the bureau whose lock most nearly resembled the conformation of the key, would be

¹ 2 P. Wms. 140 ; pl. 183.

eld to be the subject of the testamentary disposition. If all the thirteen bureaus were exactly alike, then, the donee of the key should get his choice *ut res magis valeat*, or else the declarations of the testator should be resorted to, owing to the absolute impossibility of there being any other evidence as to which of the bureaus the testator intended to bequeath.

[All the ambiguities here mentioned relate to the subject of a gift. But, *mutatis mutandis*, the same arguments are applicable to an ambiguity respecting the person of the beneficiary. In the latter case, the description of the donee is the key.

[If any part of the description suits the claimant, this affords a fulcrum for the adduction of parol evidence to prove the identity of the claimant with the person intended. For instance, Sir John Strange, in citing a case where the executor appointed was "my nephew, Robert New," which, in the endorsing, was written "Nune," and parol evidence of this fact was admitted of the error, observes that, if the phrase "my nephew" were absent, parol evidence could not be given, and the donation would have been void.¹ This, however, it must be said, is doubtful, especially as regards a bequest of personalty. Misnomers, indeed, of any kind, are, at the present day, rarely fatal in wills.²

[The general ground on which the admission of parol evidence in aid of testamentary construction rests is correctly stated in *Whilden v. Whilden*,³ to be the fact that otherwise, the will would be so far inoperative. If the will can, by possibility, have any effect independently of parol, then, such evidence never can be admitted. Even a secondary meaning of the terms will not be resorted to except where the primary meaning of the words would be insensible.⁴ But, as already stated, the question, what is the primary meaning, of a word, is an extensive one. It has lately been held that a nephew by marriage is a nephew even in the primary sense of that term.⁵

[When an illegitimate child claims under a gift to children, there being none of these, parol evidence is admissible to show

¹ See *Hampshire v. Pierce*, 2 Ves., Sen. 218; *Holton v. White*, 3 Zab. 330; *Vinkley v. Kaim*, 32 N. H. 268; *Brownfield v. Brownfield*, 20 Penn. St. 55.

² See *Miller v. Travers*, 1 Moore & Scott, 342; s. c., 8 Bing. 244; pl. 147, 181.

³ *Riley*, Ch. 205.

⁴ *Pell v. Ball*, Spear's Ch. 48.

⁵ *Grant v. Grant*, 39 L. J. R. N. S. 272.

that he has been reputed to be the child of the person named,¹ but the testator's intention to make him a beneficiary, cannot be thus proved. Williams² considers that the case cited has been overruled.³ It seems to rest on weak foundations.⁴ An illegitimate child in *ventre sa mere* may take, though it then has no name by repute, provided its right is not made dependent upon any question of paternity.⁵

[The principle on which the admissibility of parol in aid of testamentary interpretation rests, is the same as that which admits of like evidence to rebut a legal presumption. A latent ambiguity is necessarily created by parol, wherever the will does not fit the surrounding circumstances. *Necessitas non habet legem*. Hence, parol explanations are allowed *ut res magis valeat*, as much to adapt surrounding circumstances to the will, as the will to the circumstances of the case. It is not strange that such a rule of evidence has prevailed. But, it was certainly contrary to fundamental principle to admit originally of parol to rebut a legal presumption, since rules of presumption are, at least, as strong as rules of testamentary construction against which parol is not allowed to prevail. However, the law on this point is completely settled.

[The principle on which parol evidence is admissible, appears to be not so much to put the court in the position of the testator—for no evidence is admissible in the cases just specified to show that the testator intended to use words in a peculiar sense—but, rather to inform the court of things generally known—of matters of which, when made known to it, it will take judicial cognizance so far as not to require special proof that the testator did, in point of fact, dictate his will with reference to the usage in question. The principle, then, on which the admissibility of parol rests, is similar to that which is at the foundation of judicial cognizance or notice.⁶

¹ Beachcroft v. Beachcroft, 1 Mad. 430.

² 2 Exrs., 990, in note.

³ Overhill's Trust, 1 Sm. & G. 362.

⁴ See, however, 2 Redfield, 25, note.

⁵ See Gordon v. Gordon, 1 Mer. 141, 148, overruling Metham v. Duke of Devon, 1 P. Wms. 529.

⁶ See Greenleaf on Ev., 1st vol. p. 340, and 12th ed. G.; Hackensmith v. Slusher, 26 Missou. (5 Jones), 237; Cresson's App., 30 Penn. St. 437.

[The function of parol evidence in aid of the construction is to render the terms of the will itself intelligible but not to add to them.¹

[Extrinsic evidence is never admissible in respect to the words used² by the testator, but only in respect to the sense in which the words in the will were used by him. It is only as to the meaning of the terms used and not as to the terms themselves that any inquiry can be instituted by the court respecting the testator's intention ; and it is only in cases falling under propositions three, five, and seven, that parol evidence, even on this limited area, is admissible.

[Before admitting parol evidence in aid of the construction, it must be clear to the court that the words used are susceptible of some sense that is generally known, at least in the testator's neighborhood, and the meaning proved to have been attributed to the terms by the testator must not be inconsistent with the sense which the court *a priori*, and before the adduction of proof, would consider the language in the will to be susceptible.³ In other words, a totally absurd meaning cannot be proved. But a term in itself indifferent may be proved to mean anything, if custom so warrants. Thus the abbreviation "mod." may be proved to mean "model."³

[False designation is to be distinguished from false demonstration. A gift to John Brown, the donee's name being Joseph Brown, is an instance of the former kind. A gift to Joseph Brown, of Brownstown, when his residence is Castlerock, is an example of the latter class. Parol evidence in aid of the construction is usually admissible in the latter cases to eliminate the erroneous surplusage, but not to show that it was John Brown that was intended, when the name of the donee in the will was Joseph Brown, even though John Brown lived in Brownstown. This general rule, however, has suffered serious encroachments.

[Sometimes part of the designation applies to several persons equally, while the remainder of the description applies to none of them. For instance, in the case of *Still v. Hoste*,⁴ the bequest was to Sophia Still, daughter of Peter Still. He had two daughters, Selina and Mary Ann, but no Sophia. The extrinsic

¹ *Miller v Travers*, 8 Bing. 224.

² *Webster v. Hodgkins*, 5 Foster, 128.

³ Appendix, No. 1.

⁴ 6 Madd. 192.

evidence showed Selina to be the person intended by the testator. Parol evidence of intent seems to be admissible in such cases.

[In cases such as *Delmare v. Robello*,¹ when the whole description of the donee does not square with the facts there is little doubt that parol evidence ought to be received. The disposition is insensible with reference to the testator's circumstances. It, therefore, clearly falls within the principle of proposition three, and may be elucidated by parol, unless we accept in its integrity the maxim *veritas nominis tollit errorem descriptionis*. The case of *Doe d. Chavalier v. Uthwaite*,² however, shows that this maxim does not prevent the application of parol. In *Andrews v. Dobson*,³ there was a mistake doubtless on the part of the testator. But, as his error was not apparent on the face of the will, it could not be remedied in equity. If plaintiff is not designated by any part of the description of the donee, parol evidence is not admissible to show whom or what the testator intended. In other words, the net result of the cases appears to be this. Parol evidence can show that the name in the will was the usual pet or nick-name given to the donee by the testator, but not that it was given him for the first time at the making of the will, or that it was inserted by mistake for his real name, or that received by him in baptism.

[*Veritas nominis tollit errorem descriptionis*. In the case of *Doe d. Chevalier v. Uthwaite*, the devise was to the first son of John H. and his issue, remainder to Stokeham H., second son of John H., for life, remainder to his sons and daughters in strict settlement, remainder to John, the third son of John H., and his issue in like manner. John, however, was the second son, while Stokeham was the third. Parol evidence was admitted by the Court of Error to show whether the mistake was in the name or in the description. The Court of Common Pleas had held that Stokeham was the person entitled, according to the maxim *veritas nominis*, &c. This maxim, like every rule of construction, is applicable only where the context is not adverse. But if the context itself points to an error in the name, and not in the description, the maxim

¹ Pl. 30; see *Blundell v. Gladstone*, 1 Phillips Ch. 279.

² 3 Moore, 304.

³ 1 Cox, 425.

will not be applied. Every rule of construction bends to the context, but rules of evidence are not affected by the context. The testator's intention never can preclude a law of evidence, if applicable.

[In *Thomas d. Evans v. Thomas*,¹ the evidence was rejected as to what the testator declared, previous to the making of the will, to be his intention respecting the claimant, to whom part of the description applied, though the court considered that if the declarations had been cotemporaneous with the making of the will, they would have been conclusive in favor of Eleanor Evans. There being no evidence properly so called as to which of the two women was intended by the testator, the gift was held void. In this case, be it observed, the evidence was admitted. The weight of evidence, of course, is a wholly different question from its admissibility. Parol evidence is always admissible to explain whether the error is in the name or the description. The case of *Thomas d. Evans v. Thomas* would probably be not at all followed at the present day. The court will now incline the balance to any superiority of evidence, however slight.

[As to errors of name and not of description, a leading case is that of *Bradshaw v. Bradshaw*.² There a devise in trust for Robert Blagrove Bradshaw, the *second* son of the testator's daughter, was held to enure to the benefit of her second son, though his name was not Robert, but Henry, while her eldest son was named Robert. The court considered that the error was in the name, and not in the description. The court formed this opinion partly from the extrinsic evidence adduced, and partly from the frame of the will, the remainder in which was to the *third* and other sons of his daughter, thereby showing that the name of the first son was omitted intentionally.³

[Jarman considers⁴ that where part of a description appears to suit one person, and part another, the designation of each must be so accurate as that, if the other were out of the way, he could have established a title under the will. This is

¹ Pl. 140.

² 2 You. & C. 72; 1 Jarman, 378.

³ See, however, *Langston v. Langston*, 8 Bligh. N. S. 167; s. c. 2 Cl. & Fin. 194.

⁴ 1 vol. 376.

true. But that title might be established by parol evidence adduced in aid of the interpretation.

[Any description that might be helped by parol does not become null and void, because parol evidence is also required to negative the description of somebody else. A devise to my brother's son, who lives at Norwich, is good, even though the brother had seven sons and none of them lived at, but only near, Norwich. Though no nephew lived there, parol evidence would be admissible to show, first, that it was a brother's son; and, secondly, a particular son that was intended who resided near Norwich. Jarman seems inclined to hold that, as the son could not prove his title to the gift without parol, if there was no addition of the clause as to residence at Norwich, so he could not now negative the claim of his other brothers, who would be equally *hors de combat* as regarded him. The gift would, therefore, be void for uncertainty. Jarman, indeed, would probably not accept this inference from his proposition. But his postulate seems to admit of this deduction.

[Parol evidence under proposition three is really referable to the rule admitting parol evidence of *res gestæ*. For the subject and object of a gift—in other words, the circumstances of the testator—are part of the *res gestæ*. Construction, properly so called, is confined to the willing and disposing element. Evidence respecting the circumstances of the testator is thus not strictly a question of construction. But evidence of intent, under proposition seven, differs much in principle from evidence under propositions three or five. For, under proposition seven, the evidence is not of the *necessary res gestæ*, but of a particular feature of the gifts made *pro hac vice*, nuncupatively, and opening a wide door for perjury.

[Jarman¹ considers that there is no difference in principle between cases where part of the description suits one person, and part another; and those where the ambiguity is owing to the plurality of persons to whom the description is applicable. There is, however, this distinction between the two classes of cases. The former raise difficulties which are frequently ones of construction, for which the common law has provided

¹ 1 vol. 378.

various rules. Of these the maxims *error nominis*, &c., *falsa demonstratio*, &c., are samples. But, as to the latter class, the ambiguity arises not at all from the construction, but wholly from matters *dehors* the will. In these cases the description suits any of the claimants equally well.

[Parol evidence of intention, therefore, is in the abstract necessary to determine which of the latter is meant. But under propositions three or five the question is properly one to be determined on evidence of facts, and not of the testator's intention.

[The primary reason why parol evidence is admissible in these cases appears to be, not to distinguish the one party from the other, but to show, *ut res magis valeat*, that the description in the will is approximately correct, or sufficiently accurate for a practical description. In showing this the donee may then be indirectly distinguished from some other person, to whom a part of the description applies. But, where the description in the will exactly suits two or more persons or things, the difficulty is always wholly one of fact, or *res gestæ*, and not at all of construction.

[It had been decided in *Thomas v. Thomas*, *Doe v. Huthwaite*, and *Bradshaw v. Bradshaw*, that parol evidence of testator's intention could be received, where part of the devise was applicable to one person, and part to another. But in *Doe d. Hiscocks v. Hiscocks*,¹ Lord Abinger considered that those cases had been overruled by *Miller v. Travers*.² At all events, parol evidence of intention will not be received in such cases, if the question can be disposed of either by the context or by a rule of construction such as *veritas nominis*, *falsa demonstratio*, &c. But if there is nothing of law to turn the balance one way or the other, the case certainly seems to fall, in point of principle and substance, under proposition seven. The characters in the will are, as it were, cypher abbreviations, or foreign words equally applicable—though not for the same reasons—to two or more subjects or objects. The applicability of the symbols being the same, the relations of the things denoted to the text of the will may be regarded as identical, and to call, therefore, for parol evidence of the testator's intention.

¹ Pl. 183.

² *Id.*

[The rules of construction by aid of parol evidence, where part of a devise is applicable to one person, and part to another, are admirably laid down by Lord Abinger, in *Doe d. Hiscocks v. Hiscocks*.¹ In such cases he thought the evidence can relate only to the circumstances of the testator, and not to his intention—that, in other words, cases of this nature fall under proposition three and not proposition seven.

[In *Doe d. Hiscocks v. Hiscocks*, Lord Abinger admitted parol evidence of the surrounding circumstances, but not of the testator's declarations prior or subsequent to the will. This distinction between parol evidence of facts and of intention is supported by general principle, where the devise applies to one person more than to another. But where the words of the will equally apply to two persons or things, parol evidence of intention is admissible, and is often indispensable. In other words, the precise person or thing intended by the testator might not be otherwise proved. For, if there are two John Jones', the testator must have always called each by that name, and his intention cannot possibly be proved in most cases by his acts *dehors* those connected with the making of the will.

[In most of the States parol evidence will not be accepted in aid of the construction, except under the same circumstances as in England.² In *ex parte Hornby*,³ the surrogate of New York seemed to think the American code of evidence would admit of parol evidence of the testator's intentions in cases where the English courts would reject it. This is undoubted; while, as regards cases under proposition three, the courts here appear not to be so strict in defining such cases as the English decisions show.

[Though the American courts, as a general rule, follow the English principles and cases, yet, in Delaware, parol evidence is received in respect⁴ of the testator's preferences and affections. But, in New York, such evidence is admitted only in

¹ 5 Mees & W. 363; pl. 183.

² *Allen v. Allen*, 18 How. U. S. 385.

³ 2 Bradf. Sur. 420. See *Reno v. Davis*, 4 Hen. & Munf. 388.

⁴ Redfield, vol. 2, p. 506.

cases of latent ambiguity, or to rebut a legal presumption.¹ This is true also of most if not all of the other States.² It has been held in New York, in *Mann v. Mann*,³ *Hyatt v. Pugsley*,⁴ and several other cases, that the state of the testator's property cannot be shown except for the purpose of clearing up a latent ambiguity.⁵ This proposition Judge Redfield denies.⁶ It is inconsistent, certainly, with several American cases. But it is doubtful whether those decisions would be now followed. The admission of parol evidence in aid of the construction of wills is becoming daily more and more strictly watched.

[It cannot be too distinctly remembered that the rules respecting the admissibility of parol evidence in aid of the construction are founded upon the absolute necessity, (in the abstract), of adducing such evidence to prevent the gift from being void for uncertainty. It is equally to be remembered that even when parol evidence becomes necessary, as little as possible of it is accepted by the court. But if, according to the general rules of evidence, parol testimony is admissible, it cannot be rejected in the particular case; (in the concrete,) merely because special facts adduced under propositions three and five leave no doubt in the mind of the court as to who or what was intended by the testator. For instance, under a devise to John Brown, the testator's nephew, there may be no such person but only James and Charles Brown. Here parol evidence is admissible, first, under proposition three, to apply the will to either James or Charles, and, secondly, under proposition seven, of the testator's intent, even though it may have been already proved by the course of dealing and habits of the testator that James was the person intended. Proof that the testator intended Charles and not James to be the beneficiary, may then defeat all the evidence adduced under proposition three.

¹ *Id.* *Mann v. Mann*, 1 Johns. Ch. 231 ; s. c. affirmed 14 Johns. 1 ; *Jackson v. Sill*, 11 Johns. 201 ; *Massaker v. Massaker*, 2 Beas. 264.

² See *ante*, p. 51.

³ 23 Barb. 285.

⁴ *Tole v. Hardy*, 6 Cow. 333.

⁵ 2 vol. 506.

⁶ *Greenleaf on Ev.* 1 vol. 327. See *Crocker v. Crocker*, 11 Pick. 257 *Lamb v. Lamb*, *ib.* 375, per Shaw, C. J.

[Evidence of matters preliminary to the will, as the directions given to the scrivener,¹ is not admissible in aid of the interpretation, except under proposition seven. Debates in the Legislature for a like reason are not available in aid of the construction of a statute. The speakers may have changed their mind before the bill was put to the vote. A testator in like manner, although his simple volition is competent to lead to the making of any will he pleases, may yet change his mind before his testamentary act is complete. It is the finished written document, and not the intention, that constitutes the proper evidence of the will. The simple elements have no trace in the compound.

[In *Quincey v. Quincey*,² parol evidence was admitted to show that a reference in a codicil to a will of 1833 was a mistake, (that will being supposed to be destroyed,) for a will of 1837. As parol evidence is admissible of the *res gestæ* of a will, so, *pari ratione* the same reference seems admissible as to a reference to the *res gestæ* of a prior will or codicil.

[Parol evidence of the circumstances of a testator, but not of his intention, is admissible to show that repeated legacies are or are not cumulative.³ This admission is contrary to principle, for the ambiguity is patent as one of construction. The civil law admitted parol evidence, however, even of intention, in such cases.⁴ Mr. Hawkins⁵ considers that where the presumption relates to a will and codicil, and not merely to one instrument, a rule of construction and not a mere legal presumption stands in the way of admitting parol evidence. But it is not likely the courts here would hold the difficulties against the reception of parol to be varied by the fact that the whole testamentary record of the intention of the testator was contained in two documents and not in one. There is, however, greater difficulty on principle in admitting parol evidence in such cases than where a debtor gives a legacy to his creditor. Yet, in the latter class of cases parol evidence is excluded,⁶ although the question is wholly a presumption and raised by an extrin-

¹ *Brown v. Selmyne Cas, temp. Talbot* 240 ; s. c. H. L. 3 Br. P. C. 607.

² 11 Jur. 111.

³ *Wilson v. O'Leary*, 20 W. R. 28 ; *Osborne v. Duke of Leeds*, 5 Ves. 369, 380.

⁴ *Hurst v. Beach*, 5 Madd. 351.

⁵ P. 305.

⁶ *Fowler v. Fowler*, 3 P. Wms. 353-4 ; *Eaton v. Benton*, 2 Hill (N. Y.), 576 ; see, *contra*, however, *Williams v. Crary*, 4 Wendell 443.

sic or latent ambiguity, and is not furnished by the context, as is the case in a will giving repetitive legacies.

[Parol evidence is admissible that a legacy by a creditor to a debtor was or was not intended by the testator to be a release of the debt, just as such evidence is admissible in the case of cumulative legacies. But, the *déclarations* of the testator, cannot, in England, be brought in by a side-wind on the ground that they are evidence of the release of the debt.¹ Such evidence would be no answer to an action by the testator's executors, for such release would be without consideration. In the converse case of a legacy by the debtor to the creditor, there seems to be more ground for adducing direct evidence of intention, inasmuch as the will may be considered as part of the *res gestæ* of payment. The will, *with all its surroundings*, is evidence in an action by the creditor against the testator's executor. If the evidence is thus admissible for one purpose, it ought to be received also in aid of the construction of the will itself, as respects the question of satisfaction, since that question is, *ex hypothesi*, merely one of presumption, the will not being explicit on the point.

[*Semble*, parol evidence is admissible in some parts of the United States in all the foregoing cases,² as also to show that the testator intended to make his land the primary fund for the payment of his debts. At least such evidence has been admitted³ to show the state of the testator's property in order to determine whether a legacy has been charged on land or not. If adduced for such a purpose, similar evidence can doubtless also show that the land was to be the sole fund for the payment of debts and legacies. This is an extreme to which the principle of *Dey v. Dey* will hardly be pushed. The case is suspicious.

[In *Ongley v. Chambers*,⁴ the devise was of the rectory or parsonage of M. with the messuages, lands, tenements, tithes, hereditaments, and all and singular other the premises thereunto belonging, with all and every of their rights, members and appurtenances. It was held that the lands and a messuage which had been uniformly held with the parsonage for two cen-

¹ See *contra*, *Blond v. Blinkinbeard*, 8 B. Mon., 397.

² See 2 Story Eq. Jur. § 1119-1123, and the cases there cited.

³ *Dey v. Dey*, 4 C. E. Green, 137.

⁴ 8 Moore, 665.

turies previously, and had been so purchased by the testator with the parsonage, passed under the devise. The leases and other intrinsic evidence were resorted to, in order to identify the parcels. Lord Gifford C. J., distinguished the case from *Doe v. Brown* and others, where the question was not as in this case parcel or no parcel, but related to a property not comprised within the terms of the gift. Indeed the question parcel or no parcel is one of fact to be determined by a jury, and not one of construction, except that the court may see enough in the written documents before it not to direct an issue to try the question.

[Where there is a direction to raise a certain sum out of rents and profits, parol evidence has been received as to the state of the testator's property and value of the rents, in order to determine whether the charge implied a power of sale. This inquiry is often very necessary where the interest is a leasehold subject to renewal fines.¹ Parol evidence of the testator's circumstances is also received in the United States to show that he intended to charge a legacy on land.² There is, no doubt, some ground for distinguishing between this case and *Allen v. Backhouse*, for though every legatee is a mere volunteer, and cannot as such put in motion the general equitable powers of the court, yet, where the penalty for not paying the charge is a forfeiture of the whole interest, equity will as a rule relieve by ordering a sale; not by reason of the testator's charge, but in order to preserve the subject matter of the gift.

[Parol evidence is admissible to show if land is wild, in order that the court may determine whether a fee passed or not under the Massachusetts law.³ This evidence, however, is really rather to identify the parcels, than in aid of the construction.

[Under both contracts and wills, parol evidence is always admissible to identify the parties or to prove a custom. Extrinsic evidence is also admissible to show that the contract or gift is void as illegal, or that there is a misrecital or misdescription in the document,⁴ since the reference being to an external

¹ *Allan v. Backhouse*, 2 Ves. & Beam. 65.

² *Dey v. Dey*, 4 C. E. Green, 187.

³ *Sargent v. Towne*, 10 Mass. 303.

⁴ *Quincey v. Quincey*, 11 Jur. III.

thing, the ambiguity thus occasioned is latent. Relevant cotemporaneous documents, however, can be adduced in aid of the interpretation of contracts, while such evidence is as inadmissible as parol in respect to wills,¹ unless the writings are executed as wills, and not merely signed by the testator.

[About the same latitude has been allowed to parol evidence to describe the metes and bounds of parcels in questions under contracts, as when a will is the subject of construction.²

[It is thus perfectly clear that though wills and contracts are at law open to the same principles and practice of evidence, with the exception of extrinsic written documents, yet, as a matter of fact, the various usages and nomenclature of trade afford more numerous loop-holes for the adduction of parol testimony than are available in the case of a will. The cases, however, do not show that wills *in re* are, as a rule, more rigidly guarded by the courts in respect to the adduction of this kind of evidence.

[In *Winkley v. Kaime*,³ the devise was of "thirty acres more or less, in lot 37, in 2d division in Barnstead." There was no such lot as 37 in the 2d division in Barnstead; but there was lot No. 97 in that division, a part of which belonged to the testator. It was held that parol evidence was admissible to explain the latent ambiguity.

[A testator devised all his messuages and lands in the parish of D. Part of his land lay in the parish of W. Parol evidence was admitted to show that at the date of the will all the testator's lands were supposed to be in the parish of D.⁴ *Communis error facit jus*.

[In *Allen v. Lyons*,⁵ the devise was of a house and lot, in Fourth street, Philadelphia. The testator had no property in Fourth street, but had a house and lot in Third street. Parol testimony was admitted to explain the defective description. In such a case as this, be it remembered, parol evidence of the testator's intent could not be received. This is never allowed except in cases falling strictly under Proposition Seven. All that could be proved in a case like

¹ *Bell v. Bruen*, 17 Pet. 161.

² See *Doe d. Freeland, v. Burt*, 1 T. R. 701; *Brown v. Slater*, 16 Conn. 192; *Farrar v. Stackpoole*, 6 Greenleaf, 154.

³ 32 N. H. 268.

⁴ *Anstee v. Nelms*, 38 Eng. L. & Eq. 314.

⁵ 2 Wash. C. C. 475.

that of *Allen v. Lyons* is, that the testator had no property in Fourth street, but that he had property in Third street corresponding with part of the description in the devise, viz.: consisting of a house and lot. It would then be a question for the court to decide whether the description was sufficient to pass any, and, if any, what particular property, of the testator. In all such instances, since it is extremely unlikely that the testator did not mean to pass an interest at all, that part of his property which comes nearest to the description will in most cases be deemed to pass.

[A general devise of lands will pass leaseholds if the testator has no freeholds to give effect to the disposition. Such a devise may also, in other instances, operate as an execution of a power; if otherwise, it will have no force.

[So a devise of lands, stated to be situate in a certain district, may extend to lands situate elsewhere; if, otherwise, the gift would be nugatory.¹

[For the same reason a specific bequest of stock in the public funds has been applied to stock of another denomination, in which alone the testator had stock when he made the bequest.²

[Rents received by the testator, but labelled "rents," and set apart for his wife, passed under a devise to her of rents in arrear, although there was rent in arrear, and the bequest could be thus satisfied without recourse to extrinsic evidence.³

[Declarations of a testator are admissible in respect of cases under proposition three, when the declarations are not of his intention with respect to the framing of his will, but relate to the proof of circumstances from which the intent may be inferred.⁴

[The distinction between applying the provisions in the will according to their primary sense and interpreting them in a different sense is obvious enough. Parol evidence is always admissible for the former purpose. Indeed, there is no limit to

¹ *Allen v. Lyons*, 2 Wash. C. C. 475; *Doe v. Roberts*, 5 B. & Ald. 407. See, however, *Miller v. Travers*, 1 M. & Scott, 342; s. c. 8 Bing. 244.

² *Fonnerau v. Poyntz*, 1 Bro. C. C. 472, Perkins' ed. 480, note a. See, however, *Boys v. Williams*, 3 Sim. 573.

³ *Wadsworth v. Ruggles*, 6 Pick. 63.

⁴ *Greenleaf on Evidence*, § 291.

the admission of parol, if it be relevant and not adduced for the purpose of varying the construction put upon the will according to the ordinary rules of law and grammar. In such cases, says Sir William Grant, "Nothing is offered in explanation of the will or in addition to it. The evidence is only to ascertain what is included in the description which the testator has given of the thing devised."¹

[If a testator devises the house he lives in² or the one he built, or the one he enlarged, or bought from A, parol evidence is necessary to show what house he lived in, bought, repaired, or bought from A. So, with respect to land and other property, specifically given in the will. The evidence is necessary to connect the property with the public maps and surveys which the court will require as legal evidences of boundaries. The evidence will likewise identify the subject of the gift and separate it from adjacent property from which it could not otherwise be readily distinguished.

[In *Sanford v. Raikes*,³ a testator by codicil devised as follows: "I give the house in Seymour Place which I have given a memorandum of agreement to purchase, (and which is to be paid for out of timber, which I have ordered to be cut down), to the Rev. John Sanford." The testator had previously contracted for the purchase of a house in Seymour Place for £7,350, and had two days after the contract given an order in writing to his steward to cut down timber in a particular estate to the amount of £10,000. The house, of course, was identified by parol, which connected the contract to purchase with certain premises in the square. The heir, however, contended that as the codicil did not refer to any timber in particular, it was void for uncertainty and could not be rectified by parol. He relied most on the doctrine that a will in order to incorporate another document, should refer to it specifically and with sufficient marks of identification, without recourse to parol aid. On these points Sir William Grant said in words which admit of no amendment, "I had always understood that where the subject of a devise was described by reference to some intrinsic fact, it was not

¹ *Sanford v. Raikes*, 1 Mer. 646; *ante*, p. 63.

² *Doe d. Clements v. Collins*, 2 Durn. and East, 498.

³ 1 Mer. 646.

merely competent, but necessary, to admit extrinsic evidence to ascertain the fact; and through that medium to ascertain the subject of the devise. I do not know what this has to do with cases where there is a reference to some paper which is to make part of the will. There it may be considered that the will itself must specify the paper that is to be incorporated into it. Here the question is not upon the devise, but upon the subject of it. Where there is a devise of the estate purchased of A, or of the farm in the occupation of B, nobody can tell what is given, until it is shown by extrinsic evidence, what estate it was that was purchased of A, or that was in the occupation of B. In this case the direction with regard to the payment for the house amounted in effect to a devise of so much of the produce of the timber ordered to be cut down, as should be sufficient to pay for the house. What is there in the fact here referred to, namely, an antecedent order for cutting down timber, that makes it less a subject of extrinsic evidence than such a one as I have alluded to. The moment it is shown that it was a given number of trees growing in such a place or £10,000 worth in value of the timber, on such an estate, that the testator had ordered to be cut down, the subject of the devise is rendered as certain as if the number, value, or situation of the trees had been specified in the will."

[The gist of these observations of the Master of the Rolls is that description of the parcels is not any admission of parol *in aid of the construction*, and that parcels may be described by antecedent orders or contracts relating to them as well as by present and obvious marks of identification. Both classes of criteria alike must be proved by parol. The contention on the part of the heir was that a document to be incorporated in a document must be expressly so, and that a ligamen cannot be raised by parol. This is true.¹ But, as all the marks of identification of any one thing are innumerable, it cannot be necessary to enumerate them all. Any one or more marks which will lead to the identification of the thing are sufficient. The timber, for instance, in *Sanford v. Raikes* was described as a portion of the trees growing on a particular estate. *Id certum est, quod certum reddi potest*. Shylock himself could not avoid cutting down more than was necessary. The house too was sufficiently iden-

¹ See *Boydell v. Drummond*, 11 East, 141.

tified by an account of its history. All description is only approximate. If the will affords the major premiss of the syllogism, the minor can be raised by parol. For instance, let us suppose that a testator devises all his lands in the parish of A to B. Parol evidence is admissible to show what lands the testator had in the parish of A. Therefore, these latter pass to B not by parol, but by the devise. In like manner if the testator devises to B all the houses purchased by him from A, parol evidence is admissible to show what houses were thus purchased from A. This case, which is that of *Sanford v. Raikes*, is not in the least distinguishable from the instance last put. In both cases alike the parcels can only be identified by parol. That the distinguishing mark is in the one case a present event and in the other a past one, does not affect the question of bridging the difficulty over by parol. "My house that was painted red last year," ought to be as capable of being identified by parol as "my house that is now painted brown." "The house wherein I resided last year," is as good a description, so far as parol is concerned as "the house wherein I now reside." So, the house which I bought from A may be as good a description as one which sets out certain existing metes and bounds. In all such cases parol evidence is adduced to show not what the words in the will meant in any secondary sense, but what in point of fact, as distinguished from secondary construction, was conveyed by the will. Jarman says,¹ that if "the context of the will presents an obstacle to the construing of the terms of description in their strict and most appropriate sense a foundation is thereby laid for parol evidence. The real source of the ambiguity, however, is not in the context, but in extrinsic circumstances if extrinsic evidence is admissible. The ambiguity must be extrinsic and latent, not intrinsic and patent. If the "obstacle" in the way of the primary meaning of the terms used is insuperable, then a secondary sense may prevail. This often happens where after a limitation to the heirs of the body, the testator distinctly declares that he meant thereby first and other sons, taking by purchase. Obstacles of this kind, or apparent inconsistencies in the context must be all remedied by construction, and not by parol evidence.

¹ Vol. I, 361.

[The conditions necessary to subordinate the primary meaning of a clause or term to that of the context are similar to those which will subordinate the meaning of the whole will or any parts thereof to the light afforded by parol evidence. The primary meaning in the former instance must be insensible with respect to the context before the meaning of one passage can be affected by that of another. So, with respect to the whole will, as regards extrinsic evidence, the will must be insensible, inoperative, and void before any light can be thrown on the text by parol. Necessity is thus the source of parol interpretation in the latter case and of contextual light in the former.

[A gift will also be held, *ut res magis valeat*, to apply to a person who is imperfectly described, if the disposition would otherwise have no application to any one at all. In all these cases the parol evidence relates merely to the surrounding circumstances in which the testator was placed and not to his intention, wishes, or motives. From the facts the court then infers the intention, and though the opinion of the court may in point of fact be the reverse of what the testator intended, yet, no parol evidence is admissible to rebut the inference drawn by the court.

[Extrinsic evidence can rarely, if ever, affect the construction of a will as regards dispositions, which by their terms relate to a future period, such as the death of the testator. This rule applies both to the description of the subject and object of the gift. For instance, the fact that a testator had no residue left undisposed of in the will does not necessarily lead to any portion of the property being regarded as residuary.¹ The court, on the contrary, will hold the clause null and void, if to hold otherwise would be to defeat a prior gift in the will. The testator might have contemplated the contingency of his having residuary property not disposed of by any specific clause in his will. This would account for the insertion of a residuary clause, even though in fact the testator had no residue. Now, the state of facts, therefore, existing at the time of the making of the will cannot be suffered to affect the construction of the instrument in cases such as that mentioned, especially since the

¹ See 1 Jarman, 630; *Andrews v. Emmot*, 2 B. C. C. 297.

testator may at his death have property to satisfy the terms of the gift.

[In like manner, where a class of objects is not to be ascertained until the time of the testator's death, or some other period subsequent to the making of the will, extrinsic evidence of the circumstances of the testator at the time of his making of his will cannot be admitted in aid of the construction. Such testimony is evidently irrelevant, since the disposition points to a state of facts at a different period of time, which is unknown or uncertain, and which could not affect the intention of the testator, as far as regards the several then non-existing objects.

[So, if a testator bequeaths such stock of a particular denomination as he may have at the time of his decease, evidence is not admissible to show that he had no such stock at the time he made his will. Even if he had not, it does not follow that other stocks of his should be held to be comprised in the bequest, since he might purchase and own before his death stocks of the particular kind mentioned in the will.¹

[It thus appears that neither the object nor the subject of gift need be specifically pointed out on the face of the will. If the testator has furnished the means of identification, this is sufficient. A slight clue is often adequate to this purpose. Indeed, sometimes the intended beneficiary is unknown even to the testator. The objects of the gift may depend upon future and contingent acts, either of other persons or of the testator himself.² This has been objected to on the ground that the statutory attestation is not appended to the gifts to the particular devisees. This argument, however, implies too much; for it would equally prove that no uncertain donee could take under a will. When the statute of frauds, however, was passed, it was not intended by the sections relating to wills to make any change whatever in the law of future interests or of trusts, but only to require testamentary gifts of land to be evidenced in a particular manner. Contingent remainders and trusts, therefore, were not interfered with by the statute of wills, and it has always been immaterial whether the contin-

¹ See *Tift v. Porter*, 8 N. Y. 516.

² See *Petway v. Powell*, 2 Dev. & Batt, eq. 308.

gency affecting a trust or use is dependent on the acts of the settlor or on those of somebody else.

[The principle of the statutory requisition as to writing and attestation is the exclusion of parol, and the frauds likely thence to arise. But, the wills acts in the respects mentioned were not intended to abridge testamentary power in any manner, nor to render any interest general, specific or demonstrative, or even devisable, which previously was not such. At least the attestation sections do not contemplate imposing any such restraint. The objection, therefore, has no solid foundation. The argument equally applies to all future acquired property of the testator. Such property he can only describe in general terms. Why should he be curtailed of this power by any statutory requirement with respect to the *evidences* of his will. But if not restrained as to the nature of the property he may bequeath, neither can he be deemed fettered as to the description of the donees. He is not tied down to more particularity in the one case than in the other. At least no statute relating to the form and attestation of a will can have any effect upon its construction, or in curtailing the testamentary power.

[Accordingly, it was held in *Stubbs v. Sargon*,¹ that a devise to the persons who might be partners of the testatrix, or to whom she might sell her business, was valid. Lord Langdale observes in that case that the only question was whether the donees were sufficiently distinguished from other persons. It is obviously immaterial how their character of beneficiaries has been acquired, whether by their own act or that of the testator, or by the ordinary course of events. The testator intended to part with an interest; that intent is evidenced in the mode required by statute. No fraud can be committed on the testator by parol in aiding the application of his own gift. None certainly can be committed on the statute, which was only made in aid of the intention of testators. A class constitutes the real object of the testator's bounty in such cases. That the particular beneficiaries were not foreseen to be members of the class does not affect the merits of the genus as representing which alone they are entitled to partake of the testator's

¹ 2 Keen, 255.

assets. Necessity, which is the reason for admitting¹ parol evidence at all, is also the parent of the rule which allows unknown members of a known and specified class to take in despite of any statutory requirement as to attestation.

[Extrinsic evidence then cannot be given directly of the testator's intention, except in the cases provided for by Proposition seven. Neither can extrinsic evidence of any facts be given in aid of the interpretation until the primary and grammatical construction of the passage in question is wholly void, as being insensible with reference to the surrounding circumstances of the testator. But, extrinsic evidence is, of course, always admissible to apply the dispositions to the facts of the case and the various clauses to their appropriate subjects and objects.

[Parol evidence must always be more or less adduced to apply the dispositions of a testator to his property. For instance, the court must be satisfied that the testator did not own property devised away from a legatee before a case of election can be raised for such legatee. Even in the simplest case the court will not make a decree concerning property until it is at first made aware by extrinsic evidence that there is such property. The court, therefore, always admits any parol evidence necessary to show the state of the testator's property. The court thus places itself in the position of the testator, and applies the dispositions in the will from that point of view. In America, as in England, where the primary meaning of a disposition is insensible, evidence has been in many cases admitted, in aid of the construction of facts known to the testator which may reasonably be supposed to have influenced him in disposing of his means.¹ This is really to admit indirect evidence of his intention, direct proof of which is confessedly not allowable, although direct evidence may be given of the state of the property from which knowledge by the court, it may, if necessary to give some effect to the disposition, infer what the testator's intention was. The distinction is obvious. The court will accept evidence to show that freeholds could not have passed by a certain devise because the testator had no freeholds in the district, but only leaseholds. But the court will not listen to evidence showing that the testator was grateful to the devisee, for many favors

¹ *Ellis v. Essex Merrimac Bridge*, 2 Pick. 243; *Wootton v. Redd*, 12 Grattan (Va.), 196.

received from him, and promised to devise to him not only freeholds, but also leaseholds.

[The parol evidence must be of facts, not of the motives of the testator; his gratitude, feelings, affections, or aversions, as expressed by him at any time. The facts however may relate to the condition of the property, or to the testator's dealings with it, especially where these relate to the description of the parcels as "the lands I bought from B," &c. The court will try to sit, as it were, in the chair where the testator made the will, to look from that position upon the promised inheritance, and totally to forget any precedent motives not expressly referred to in the will. The view of the court is thus almost literally a material one. It will always regard the state of the property;¹ but as the eye sees not itself, so the court will not turn inward upon the mind or intention of the testator (except in the cases specified under Proposition seven), or take any cognizance of his motives, fears, or affections, except so far as they are recorded in the will.

[Extrinsic evidence is thus the means of applying the testamentary dispositions in all cases. But, it does not react upon the meaning of the will, until it finds no place to rest on any property of the testator. It then re-seeks the judicial abode, where it is applied from the necessity of the case, *ut res magis valeat*, to give a new meaning to the will. With this new meaning, it again goes forth, and if it finds a dry spot on any property that suits the new meaning given to the clause, it settles there, and so gives effect to the testamentary disposition.

[We thus see how extrinsic evidence is diverted from applying the will to construing it. It never is suffered to undertake this latter function until the legal interpretation is worthless, and finds nothing whereon the testamentary disposition in its primary sense may operate. The condition, therefore, the *sine quâ non*, of the admissibility of parol evidence to aid in the construction of a will is the impossibility of the passage in question having any effect according to the general rules of law and grammar, if strictly enforced.

[Jarman,² therefore, appositely suggests that an investigation of "facts often materially aids in elucidating the scheme of dispo-

¹ Holsten v. Sampson, 4 Esp. 184; 1 Greenl. on Ev. § 287.

² Vol. I, 363.

sition which occupied the mind of the testator." Such investigation, however, is wholly inadmissible for the purpose alleged, so long as the grammatical and primary meaning of the terms used is sensible with reference to surrounding circumstances. But if the language of the will thus construed is insensible, then, parol evidence is not merely often, but is always, admissible to raise, and if possible to establish, a secondary and operative construction.

[The court is bound "to shut its eyes" to surrounding circumstances, so far as the interpretation, as distinguished from the application, of the will is concerned, until it finds itself stumbling.¹ It then may exercise its vision, and guide its progress by extrinsic light. But, until the legal interpretation begins to fail, or rather unless it falls powerless, extrinsic evidence as a guide to the testator's intention is always inadmissible.

[It cannot be too often inculcated, nor too distinctly observed, that parol evidence is never admissible in aid of testamentary construction, except from absolute necessity. There must be no alternative but total failure and want of operation in the clause under review, before extrinsic evidence is admissible. If the passage can in its primary sense have any, even the least operation, it will not be allowed to have any more by means of parol.

[The difficulties supposed to be inherent in this branch of testamentary law spring from a neglect of the simple rule, that extrinsic evidence is not admissible, until intrinsic evidence wholly fails to fit the surrounding facts. The parol evidence received in all cases of non-contested wills, generally relates only to the application, and not to the construction of the documents.

[This part of the subject cannot be better elucidated, than by the class of cases which decide that the word child or children comprises only legitimate children, unless there neither are, nor ever can be any legitimate children to satisfy the terms of the gift.² If this impossibility arises, then illegitimate children can take. Parol evidence, of course, is the instrument whereby this secondary interpretation is adopted.

[Although Jarman has investigated this branch of his subject with his usual regard to philosophic precision, yet he is perhaps

¹ 1 Greenl. on Ev. § 290; *Brown v. Saltonstall*, 3 Met. 426.

² *Fouke v. Kemp*, 5 Harr. & Johns, 135.

not quite accurate where he says that a judge, by seeing facts from the testator's stand-point, "may find himself justified in departing from a strict construction of the testator's language."¹ *Seemle*, the judge cannot give any such loose reins to his interpreting functions. He may see the inheritance from any point of view, however elevated, but he is firmly tied down by the rules of law, language, grammar and composition, except so far as the context releases him and gives him more latitude. But extrinsic evidence cannot allow any degree of this liberty until the will, or part thereof, is wholly insensible, when applied according to the primary meaning of its terms, to the circumstances of the testator.² The cases mentioned by Jarman are all instances where the will, in the primary sense of its terms, was wholly insensible. His opinion, therefore, is substantially correct; but it is couched in language apt to lead the cursory reader astray as to the province of parol evidence.

[In *Grant v. Grant*,³ there was a plain equivocation. The testator gave a bequest to his nephew, A. B. His wife's nephew was also named A. B. The court considered that the primary meaning of the word nephew comprised nephews by affinity as well as by consanguinity. But, if the court had held that the term had only one primary meaning, then, no parol evidence would have been at all admissible, unless the testator left two or more nephews by consanguinity named A. B.

[Questions relating to evidence are essentially scientific, and reducible to general rules. Questions of testamentary construction are innumerable, *Quot hominum, tot sententiæ*. Yet, the utility of general rules of testamentary construction has never been impugned. *A fortiori*, therefore, is it desirable that the rules of parol evidence should be strictly enforced. Any relaxation made in a seemingly hard case will open a wide door for future litigation, and will tend to render the devolution of property by will uncertain and damnable. Hard cases are the beaten bounds of legal rules. Their value is often in direct proportion to their severity.

[Parol evidence is never admitted except with reference to the subject or object of a gift. Even the quantity of interest is to be determined by construction, and not by evidence.

¹ Vol. I, 364.

² *Brearley v. Brearley*, 1 Stocks. N. Y. 21.

³ *Ante*, p. 102.

Although the fifth proposition asserts that parol evidence may be given on this head, yet no case cited by Sir James Wigram throughout his whole treatise supports this view. It is not too much to say that proposition five is inaccurate on this head. Where a devise of uncultivated land passes a fee, or where a fee passes, as in New York, by a general devise of land, this is done by construction. For, parol evidence is not admissible to show that a devise of uncultivated land in Massachusetts does *not* pass the fee. But if the question were one of evidence, and not of construction, testimony on both sides would, of course, be admissible. Parol evidence may be given that the land was uncultivated. Here the evidence relates to the subject of gift. But, parol evidence cannot be given that a fee does not pass for this relates to the quantity of interest, or to the limiting and conveying element.

[If we consider every testamentary gift as divisible into subject, verb, and object, we will find that parol evidence is never admitted in respect to the verb, either under proposition three, five, or seven.

[If it be asked why evidence of intent is not allowed under proposition three, the answer is obvious. Such is not the best evidence of which the case admits, as it would open a wide door to perjury, besides repealing the wills acts and abrogating the common law rules of evidence. But evidence of intent is admitted under proposition seven, because, though the testator comply with the requisites of the wills acts, yet his disposition may be void unless evidence of intent is admitted. It is in the power of a testator to make an appropriate disposition to A., but it is not always in his power to negative the claims of every other A.

[Under proposition three, the testator may not have strictly done his duty. He or his donee is not to benefit, therefore, by such a delict. But under proposition seven, the testator has done his duty by making a plain disposition. It should not, therefore, be suffered to fall to the ground by excluding evidence.

[Where the meaning of an instrument becomes ambiguous in consequence of extrinsic evidence showing a usage, the question of intention is one for the jury to determine.¹]

¹ Greenleaf on Ev. p. 345; Doe v. Bevis, 18 L. J. 628.

PROPOSITION IV.

*Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the Court of the proper meaning of the words.*¹

56. This Proposition (which, in truth, is involved in the first Proposition stated above) scarcely needs authority to support it. The evidence merely *declares* what the characters or words are; and for the purpose of ascertaining that, a Court may call a witness, as it would look into a book or dictionary for the same purpose.

57. *Masters v. Masters*,² *Norman v. Morrell*,³ and *Goblet v. Beechey*,⁴ are authorities for the first branch of the Proposition.⁵

[¹ See per Maule, J. 9 Cl. & Fin. 502; per Tindal, C. J. ib. 566; 1 Greenleaf on Ev. 3d ed. 401.]

² P. Williams, 421.

³ 4 Ves. 769.

⁴ Appendix, infra, No. I. [3 Sim. 24; s. c. on appeal, 2 Russ. & Myl. 624.]

⁵ In a recent case in which a question arose (upon the obscurity of the handwriting) what the words of an instrument were, the *Court* decided the point, and refused to let it go to the jury. *Reman v. Hayward*, 2 Adol. & Ellis, 666, n. [On the question whether, and in what cases, the Court will look at an original will of personal estate with a view of deriving from the form, character, or manner of writing, or from what otherwise

58. The common practice of the Courts in receiving translations of instruments written in foreign languages proves the second branch of the Proposition. So, within the same principle, if a testator express himself in terms, with which, as a member of a particular trade or calling, he is familiar, the evidence of persons acquainted with the proper meaning of such terms is admissible to interpret them.²

may appear thereon, aid in determining the meaning or construction of the will, see *Phillipps v. Chamberlaine*, 4 Ves. 57; *Compton v. Bloxham*, 2 Coll. 204; *Oppenheim v. Henry*, cited 9 Hare, 802, note; *Gann v. Gregory*, 3 De G. M. & Gor. 780; *Shea v. Boschetti*, 18 Beav. 321; 2 Phil. Evid. ch. 1, s. iii. In *Gauntlett v. Carter*, 17 Beav. 586, the punctuation of a will was relied upon in the judgment. In *Langston v. Langston*, 2 Cl. & Fin. 240, Lord Brougham looked at the *draft* of the testator's will. "I had" said his Lordship, "a curiosity to see the draft from which the engrossment was made, and one party were exceedingly anxious that my curiosity should be gratified; but that anxiety was met by just an equal anxiety on the opposite side that it should remain unsatisfied. I at once, therefore, proceeded to have a still greater anxiety and curiosity, because I plainly saw it was likely to be a decisive matter. I was aware, as a lawyer, that I had no right to look at it; but, humanly speaking, it was impossible not to wish to see whether one's extra-judicial conjecture was well founded, namely, that the whole history of this was an error in copying; and accordingly, when I looked at it, I found that there was a limitation to the first son of a testator's son, J. H. Langston, which the person who made the engrossment had for a very obvious reason passed over in copying it; having in his haste gone from the same word in one line to the same word in another, in mistake. I here lay that entirely out of view. It has no right to enter into the consideration of the case, and I can positively assure your Lordships that I have formed my opinion upon the instrument as it now stands, without matter *dehors*, without having recourse to the draft. I have no right to look at the draft, but anybody who reads this will cannot, if he has his senses about him, doubt that some mistake must have happened; and that is a legitimate ground in construing an instrument, because that is a reason derived not *dehors* the instrument, but one for which you have not to travel from the four corners of the instrument itself."]

² *Att.-Gen. v. Plate Glass Co.* 1 Aust. 39; *Goblet v. Beechey*, App. *infra*; s. c. 3. Sim. 24; *Smith v. Wilson*, 3 B. & Adol. 728; and *Richardson v. Watson*, 4 B. & Adol. 787. So, in the recent case of *The King v. Mashiter*, 6 Ad. & Ellis, 153, the Court, upon the construction of a charter,

[All symbolic writing, as also figures, ciphers, shorthand, foreign and technical expressions¹ may be explained by parol. A testator bequeathed to his son "the sum of *i. x. x.*" Extrinsic evidence was admitted to explain the meaning of these letters.² They were in fact equivalent to £ *s. d.*

[Evidence of the habits of the testator is admissible where he has called things or persons by peculiar names. The will is

held that a word of uncertain meaning ("inhabitant") must be interpreted by extrinsic evidence of usage, or by reference to the context and objects of the charter. The cases of mercantile contracts are in point. See *Clayton v. Gregson*, 5 Adol. & Ellis, 302, and the cases there cited by counsel. In *Clayton v. Gregson*, it was held, that, in construing a mining contract, evidence was admissible to show the meaning of the word "level" as understood by coal-miners. It was held, however, that the finding as to the meaning of the word "level," did not, under the circumstances, raise a conclusion of law, that the contracting parties used the term according to such meaning, but was only evidence from which a jury might draw that conclusion. That is, it is an extrinsic fact material to the right interpretation of the words of the contract. *Infra*, Prop. V.

[So, "the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of extrinsic evidence to show the sense in which he used them, in like manner as if his will were written in cipher or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will" (per Lord Abinger, C. B., in *Doe d. Hisocks v. Hisocks*, 5 M. & W. 363). In the recent case of *Kell v. Charmer*, 23 Beav. 195, the testator by his will expressed himself as follows.—"I give and bequeath to my son William the sum of *i. x. x.* To my son Robert the sum of *o. x. x.*" The letters *i. x. x.* and *o. x. x.* were written in pencil in the original will, but were included in the probate.

[The testator, in his lifetime, had carried on the business of a jeweller, and had, in the course of such business, used certain private marks or symbols to denote prices, etc.; and extrinsic evidence was tendered to prove that, according to such system, the letters *i. x. x.* and *o. x. x.* represented the sums of £100 and £200 respectively. The cases of *Goblet v. Beechey*, (Appendix, *infra*, No. I.); *Clayton v. Nugent*, 13 M. & W. 200; *East v. Twyford*, 9 Hare, 712, 4 Ho. Lo. Cas. 517, and *Shore v. Wilson*, 9 Cl. & Fin. 355, 555, were cited. Sir John Romilly, M.R. admitted the evidence.]

¹ *Kell v. Charmer*, 23 Beav. 195.

² *Id.* See note 1, page 136.

so far like a writing in cipher or in a foreign language as the meaning of the words used is not generally known.

[Where words have only a local meaning, or have both a general and a local use, parol evidence is admissible, to show that they were used by the parties to a contract in the local sense. But, if the words have no local or technical meaning, parol evidence is not admissible to show that they were used in a peculiar sense by the parties in that particular case.¹ If the words are used in a sense peculiar to a religious sect, this, of course, renders parol explanations admissible.² Similar rules appear to be applicable to words used in wills.

[Although short and incomplete terms, which, *per se*, are unintelligible, may be explained by parol, yet, their meaning thus explained will not, except where the terms are well known in trade, be suffered to contradict or even modify the meaning of the rest of the document.³

[As the fact that a testator stood *in loco parentis* to a legatee, is provable by parol, this may show that the testator used the word child in a peculiar sense. The evidence may also, of course, have the consequential effect of preventing the child from taking both a legacy and a subsequent endowment from the testator.⁴

[The case of *Lee v. Paine*,⁵ though regarded unfavorably by Judge Redfield, seems to have been decided by V. C. Wigram on sound principles, and on the ground that a nick name is a sufficient designation where no other person of the name claims.⁶

[Sir James Wigram deprives his fourth proposition of much of its natural value by not including there under cases of pet or nick names as appropriate subjects to elucidation by parol.

[Judge Redfield thinks that *Beaumont v. Fell*,⁷ and *Masters v. Masters*⁸ would not be followed at the present day. These cases, however, seem to fall under proposition four. So do all cases of pet or nick names.

¹ See *Gray v. Harper*, 1 Story's R. 574.

² *Selden v. Williams*, 9 Watts, 9.

³ *Farm. & Mech. Bank v. Day*, 13 Verm. R. 36.

⁴ *Powys v. Mansfield*, 3 My. & C. 359.

⁵ See Redfield, 632.

⁶ 1 P. Wms. 421; *post*, pl. 65.

⁷ 4 Hare, 251.

⁸ 2 P. Wms. 141.

[If no part of the written description applies to the person or thing alleged, parol evidence is said not to be admissible.¹ But proposition four is a very comprehensive one, and may provide for numerous miscellaneous cases of this kind. The Court, too, sometimes transposes names, if this will render the will sensible with regard to the extrinsic circumstances.

[In cases under proposition four there is not really any equivocation. The words are not equally applicable to two or more subjects or objects of gift, but are simply imperfect descriptions of only one subject or gift. In such cases parol evidence of intent ought not to be admitted. It is not necessary. In *Beaumont v. Fell*,² therefore, such evidence appears to have been received contrary to principle. The case, however, is distinguishable from *Miller v. Travers*,³ where the primary meaning of the terms in the will were sensible, and where the only ground for adducing parol evidence was the untenable one of mistake.

[Parol evidence cannot be given to fill up a total blank left for the name, either of the subject or object of the gift.⁴ In the case of *Hunt v. Hunt*,⁵ the bequest was to Lady —. Lord Thurlow considered the blank to be virtually total, and that extrinsic evidence was inadmissible.

[But, in *Abbot v. Massie*,⁶ where the bequest was to Mr. and Mrs. G., Lord Brougham directed an inquiry as to who Mrs. G. was. The case is distinguishable from *Hunt v. Hunt*, inasmuch as an abbreviation, a pet or nick name or cipher, is very different from a total blank.

[In *Price v. Page*,⁷ the bequest was to — Price, son of — Price. Parol evidence was admitted by Sir R. P. Arden, M. R., to show that a son of the testator's niece of that name was brought up by the testator, who had no other relation of that name, and had promised to provide for him. Here the omission was of the Christian name. An omission of the surname could, doubtless, be supplied by parol on the same principle.

¹ *Hiscocks v. Hiscocks*, 5 M. & W. 362; *Miller v. Travers*, 8 Bing. 244.

² 2 P. Wms. 141.

³ 8 Bing. 244.

⁴ 1 Jarman, 383; *Miller v. Travers*, 8 Bing. 244.

⁵ 3 Bro. C. C. 311; see also 1 M. & Scott, 351.

⁶ 3 Ves. 146.

⁷ 4 Ves. 680.

[Under proposition four a wide footing is given for the parol lever.

[In *Andrews v. Dobson*,¹ the bequest was to James, son of Thomas Andrews, of Eastcheap, printer. There was no Thomas Andrews in Eastcheap, but there was James Andrews who had two sons, one named Thomas, by his first wife, who was related to the testator, and one named James, by his second wife. The son of the first wife claimed the legacy, on the ground that the testator meant to write "Thomas the son of James," instead of "James the son of Thomas." But Sir Lloyd Kenyon, M.R., dismissed the bill, and would not admit any extrinsic evidence.

[Propositions three and four are reducible to one thus :—Technical terms, names of places and persons and foreign expressions may be explained by parol. The name of a place or person is, as it were, a term of social art. The generic term land would particularize nothing. The distinctive appellations, therefore, of places, are, as it were, terms of convenience known to the neighborhood but not to the world. Such appellations are of a different nature from ordinary or common nouns, the meaning of which can be ascertained by reference to a dictionary. The principle, then, which admits parol evidence to apply a bequest to its appropriate subject-matter and object, is the same as that which permits technical terms of art or foreign expressions to be explained by those familiar with the use of such terms.

[There seems to be no solid reason for restricting the aduction of parol evidence more in respect to the object than the subject of a gift, although, indeed, it is a leading rule that instruments are to be interpreted according to the subject-matter. Still, as the technical or local meaning of terms may be explained by parol on the ground of the convenience of admitting such evidence so, *pari ratione*, any nick or pet name may also be proved by parol.

[In *Goblet v. Beechey*,² the question was whether the word Mod. occurring in the codicil of a sculptor meant models. The opinions of sculptors and experts in handwriting differed on the point. Lord Brougham decided that a formal bequest could not be held revoked by a doubtful word in the codicil. A

¹ 1 Cox, 425.

² 3 Sim. 24 *ante*, pl. 57.

person who attested the will offered to explain the testator's meaning. But this evidence, of course, was inadmissible. If any reasonable evidence showed that the word had any meaning, either as used by the public, by sculptors, or by the testator, Lord Brougham ought, it would seem, to have admitted the evidence *ut res magis valeat*. If his lordship's theories on questions of philosophy are not more solid than some of his legal decisions, he can be regarded as a Bacon only on the ground of being highly experimental.

[The explanation of technical terms of art or of a foreign language orally to the Court¹ is not, when strictly considered, a case of evidence of *facts* at all. The explanation relates rather to general usages or laws of which the judges will then take judicial cognizance, just as they have often sent cases for the opinions of their brethren. Such terms of art or foreign expressions are, like foreign laws, facts of a peculiar kind with which the Court deals. But it will not allow proof that such terms were used by testators in any but the primary sense, unless an extrinsic foundation is laid for the adduction of such evidence, just as if the will was in the vernacular.²

[Evidence admissible under proposition four cannot be used for any purpose except that of merely explaining the meaning of the peculiar phraseology under consideration.³ The *semble* evidence of the witnesses should relate to the usage, and not to their own opinions, where the question is one which relates to a use of terms or a custom of trade.⁴]

¹ *Masters v. Masters*, 1 P. W. 421.

² *Goblet v. Beechey*, 3 Sim. 24; 2 Russ & My. 624; see *Salmon v. Stuyvesant*, 16 Wendell, 321; *Chappel v. Avery*, 6 Conn. 34; 1 Story's Eq. Jur. § 180 a; *Mitchell v. Gard*, 32 L. J. Prob. 129.

³ 14 How. 445; 2 Kent, Comm. 556; 3 *id.* 260, and note; 1 Greenl. Ev. § 295; 2 Cr. & J. 249-50.

⁴ *Winthrop v. Union Insurance Co.* 2 Wash. C. Ct. 7.

PROPOSITION V.

For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material¹ fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.²

The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.

59. The evidence under the Proposition last considered (the Fourth) is applicable only to the purpose

¹ *Infra*, pl. 98.

² See per Lord Wensleydale, in *Shore v. Wilson*, 9 Cl. & Fin. 556, and in *Grey v. Pearson*, 6 Ho. Lo. Cas. 106; per Sir W. P. Wood in *Webb v. Byng*, 1 Kay & Joh. 585; *Martin v. Drinkwater*, 2 Beav. 215; *Passmore v. Hugins*, 21 Beav. 103; *Blundell v. Gladstone*, 11 Sim. 467; s. c. nom. *Camoy's* (Lord) v. *Blundell*, 1 Ho. Lo. Cas. 778; *Doe d. Evans v. Evans*, 10 Ad. & Ell. 228; *Innes v. Sayer*, 3 Mac. & Gor. 606.

of determining the meaning of the characters and words *in the abstract*. The purpose of resorting to the evidence now under consideration is to determine their *meaning in the will*.

60. This Proposition, when examined, will be found to be involved in the Second and Third Propositions, which have already been stated. For, if the strict and primary sense of a testator's words is to prevail in construction wherever the circumstances of the case admit of their being so construed, (Second Proposition), extrinsic evidence *must* be admissible, to inform the Court whether this rule of law can be applied or not. And if, where the circumstances of the case make it impossible that the words of the will could have been used by the testator in their strict and primary sense, a popular or secondary sense may be put upon them (Third Proposition) extrinsic evidence of the state of the testator's family and affairs must be admissible, or a Court would be without the means of judging in what popular or secondary sense (if any) the testator may have used the words. Cases, illustrating this Proposition, have occurred in considering the two Propositions just referred to. A few additional examples, however, with some observations upon them, will assist in elucidating the subject.

61. EXAMPLE 1.—Where the *person* or *thing* intended by the testator is the point of contention, the office of the Court is simply to *declare* what person or thing is described in the will.

62. The proposition now under consideration asserts, that, in all cases, calling for such a declaration, evidence as to the nature, name, marks, qualities, etc., of the subject mentioned in the will (whether person or thing) is admissible, in order to enable the Court to de-

termine whether the description in the will applies or not.¹

63. If a man devise his estate, *correctly* described as the manor of Dale, evidence must be admissible to show that a subject exists which answers the description in the will.² This needs no authority.

64. EXAMPLE 2.—If the description in the will is *incorrect*, evidence that a subject—having such marks upon it—exists, must be admissible, that the Court may determine whether such subject, though *incorrectly* described in the will, be that which the testator intended. No question can be raised for the opinion of the Court without such evidence.

65. In the legitimate application of this process, a nickname has been held a sufficient description of the object of a testator's bounty,³ it being proved that the testator was in the habit of calling the legatee by such name.⁴

66. So, also, a name gained by reputation, though not strictly appropriate,⁵ may be a sufficient description of the person intended.

67. So a description, though false in part, may, with reference to extrinsic circumstances, be absolutely

¹ Fonnereau v. Poyntz, 1 Bro. C. C. 472; Herbert v. Reid, 16 Ves. 481; Sandford v. Raikes, 1 Mer. 653; Press v. Parker, 10 Moore, 185; Doe d. Templeman v. Martin, 4 B. & Adol. 77. [Reynolds v. Whelan, 16 L. J. Ch. 434, *infra*, Prop. VII. note.]

² See per Coleridge, J., in Preedy v. Holton, 4 Adol. & Ellis, 82.

³ Edge v. Salisbury, Amb. 70; Dowset v. Sweet, *id.* 175; Baylis v. Attorney-General, 2 Atk. 239; Maybank v. Brooks, 1 Bro. C. C. 84; Goodinge v. Goodinge, 1 Ves. sen. 230; Parsons v. Parsons, 1 Ves. jun. 266; [and see 1 Hoven, Supp. 112;] Doe d. Beach v. Lord Jersey, 3 B. & C. 870. And see Hiscocks v. Hiscocks, *infra*, pl. 183.

⁴ [Lee v. Pain, 4 Hare, 252.]

⁵ River's case, 1 Atk. 410; Crounden v. Clerke, Hob. 32. [4 Hare 248; Queen's College v. Sutton, 12 Sim. 521.]

certain, or, at least, sufficiently so as to enable a Court to identify the subject intended; as where a false description is superadded to one which by itself would have been correct.¹ Thus, if a testator devise his *black*

¹ [In *Kennell v. Abbott*, 4 Ves. 802, testatrix gave a legacy to a man whom she described as 'my husband,' Edward Lovell, supposing him to be in fact such, whereas at the time of his marriage with the testatrix, he had had a wife living. Sir R. P. Arden, M. R., said:—"The first question is, whether this legacy is or is not a legacy which this man can claim under the circumstances that it is given him *as the husband of the testatrix, though he does not possess that character*. I thought it a case rather novel in its circumstances, and that scarcely has afforded any decision in the law of England, though there are some dicta in the Civil Law that seem to bear upon the point. The passage cited from the Digest (Book xxxv., tit. 1, l. 72, s. 6) is, 'Falsam causam legato non obesse verius est, quia ratio legandi legato non cohæret: sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse.'

"The meaning is, that a false reason given for the legacy is not, of itself, sufficient to destroy it; but there must be an exception of any fraud practised from which it may be presumed that the person giving the legacy would not, if that fraud had been known to him, have given it. That, from a book of great authority, seems to be the principle of the Civil Law.

"The question is, whether, according to the law of England, that can apply to a case like the present, and whether the law will permit a man who obtains a legacy in such a manner, to have the benefit of it.

"I have not been able to find anything that bears any very decisive analogy to this, but, upon general principles, I am of opinion that it would be a violation of every rule that ought to prevail as to the intention of a deceased person, if I should permit a man availing himself of that character of husband to the testatrix, and to whom in that character a legacy is given, to take any part of the estate of a person whom he so grossly abused, and who must be taken to have acted upon the duty imposed upon her in that relative character. I desire to be understood not to determine that where, from circumstances not moving from the legatee himself, the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection to that child, supposing it his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and the child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail; for circumstances of personal affection to the child might mix with it, and which might entitle him, though he might not fill that character in which the legacy is given. My decision, therefore, totally avoids such a point. Neither would I have it understood that if a testator, in consequence of supposed affectionate conduct of his wife, being deceived by her, gives

horse, having only a *white* one,¹ or devise his *freehold* houses, having only *leasehold* houses,² the white horse in the one case, and the leasehold houses in the other, would clearly pass. In these cases the *substance* of the subject intended is certain, and, *if there be but one such substance*,³ the superadded description, though false, introduces no ambiguity; and as, by the supposition, the rejected words are inapplicable to any subject, the Court does not alter, vary, or add to the effect of the will by rejecting them. To such cases, the maxim, *falsa demonstratio non nocet*, may, with propriety,⁴

her a legacy as to *his chaste wife*, evidences of her violation of her marriage vow could be given against that. It would open too wide a field. But this decision steers clear of that point. This is a legacy to her supposed husband and under that name. He was the husband of another person. He had certainly done this lady the grossest injury a man can do to a woman, and I am called upon now to determine whether the law of England will permit this legacy to be claimed by him. Under these circumstances I am warranted to make a precedent, and to determine that wherever a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy." And see *Giles v. Giles*, 1 Keen. 685; *Penbold v. Giles*, 6 L. J. N. S. Ch. 4; *Rishton v. Cobb*, 9 Sim. 615.]

¹ *Door v. Geary*, 1 Ves. sen. 255; Touch. 432.

² *Day v. Trig*, 1 P. Wms. 286. [*Doe d. Gunning v. Lord Cranstoun*, 7 M. & W. 1; and see per Sir J. L. Knight Bruce, in *Hall v. Fisher*, *supra*, page 24, n. 9.]

³ See per Lord Kenyon, C. J., in *Thomas v. Thomas*, 6 T. R. 375.

⁴ See further Hob. 32; 8 Vin. Abr. 310, pl. 4; 2 Eq. Abr. 415; pl. 6; *Gynes v. Kernsley*, 1 Frem. 293; *Parsons v. Parsons*, 1 Ves. jun. 266; *Dowset v. Sweet*, Amb. 175; *Garth v. Meyrick*, 1 Bro. C. C. 30; *Stockdale v. Bushby*, 19 Ves. 381; s. c. *Cooper*, 229; *Smith v. Campbell*, 19 Ves. 403; *Welby v. Welby*, 2 Ves. & B. 191; 1 Inst. 3 a.; Com. Dig. Estate (1); *Richardson v. Watson*, 4 B. & Adol. 779; *Miller v. Travers*, 8 Bing. 244; *Doe d. Smith v. Golloway*, 5 B. & Adol. 43. [See per Alderson, B., in *Morrell v. Fisher*, 4 Exch. 604; *Schloss v. Stiebel*, 6 Sim. 1; *Newbolt v. Pryce*, 14 Sim. 354; *King v. Wright*, *ib.* 400; *Hopkinson v. Ellis*, 5 Beav. 34; *Bristow v. Bristow*, *ib.* 291; *Ryell v. Hannam*, 10 Beav. 536; s. c. 16 L. J. Ch. [491; *Gallini v. Noble*, 3 Mer. 691; *Bradshaw v. Thompson*, 2

be applied; and this is the proper limit of that maxim.¹

68. So, where the same thing has two names, as, if I give lands to Christ Church in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford*, evidence may be given of the fact, that the precinct of Oxford and the University of Oxford are one and the same.²

69. If a testator, having freehold and leasehold property in the same place, devise all his messuages, lands, tenements, and hereditaments in that place to uses applicable only to freehold property, the leasehold property will not generally pass; but if, in fact, the leasehold property had been blended in enjoyment with the freehold, the leasehold property will pass, although the

Y. & Coll. N. C. 295; *Goodlad v. Burnett*, 1 Kay & Joh. 341; In re the trusts of the will of Bridget Feltham. *ib.* 528; *Reynolds v. Whelan*, *infra*, Prop. VII.; *Attorney-General v. Pyle*, 1 Atk. 435; *Adams v. Jones*, 9 Hare, 485; *Bernasconi v. Atkinson*, 10 Hare, 345; *General Lying-in Hospital v. Knight*, 21 L. J. Ch. 537; *Lane v. Green*, 15 Jur. 763. *Re Blackman*, 16 Beav. 377, might probably have been supported under the above maxim, without reference to evidence of intention, which it is submitted was under the circumstances, inadmissible.]

¹ See further, S. P. *infra*, pl. 133.

[Upon the principle expressed in this maxim, must, it is conceived, rest the established rule, that where a testator in terms bequeaths to part only of a number of individuals, described as composing a particular class, *e. gr.*, "to the *three* children of A.," who has four children at the date of the will, and none of the intended legatees are named nor can be identified, either by the context of the will or by extrinsic evidence, it is to be presumed that he intended a benefit to the entire class, and that his *numerical* description of it must be wholly disregarded. In such a case the restrictive expressions are accordingly rejected, as merely inaccurate, and the entire number of individuals answering the description are admitted as legatees. In *Garvey v. Hibbert*, 19 Ves. 124, under a legacy "to the *three* children of A. the sum of £600 each," the *four* children of A. were held entitled to £600 apiece. See also *Lee v. Pain*, 4 Hare, 249; *Morrison v. Martin*, 5 Hare, 507; *Daniell v. Daniell*, 3 De G. & Sm. 337; *Yeats v. Yeats*, 16 Beav. 170.]

² *Infra*, pl. 197.

limitations be to uses strictly applicable to freehold property only.¹

70. The admissibility of evidence of the nature and for the purposes here adverted to, without transgressing the strictest limits of exposition, must, it is conceived, be obvious. Exposition—as applied to cases in which the only question is, whether a given subject is sufficiently described in a will—can mean nothing else than deciding upon the aptness of the testator's expressions to identify the subject in question. The only point to be decided, in such cases, is, whether the description in the will does or does not correspond with that of the subject it is said to describe. The most accurate description possible must require some development of extrinsic circumstances to enable a Court to decide upon its sufficiency; and the least accurate description, which is sufficient to satisfy the mind of a judge or jury as to a testator's meaning, must be within the same principle. The principle cannot be affected by the consideration that a more ample development of circumstances is necessary in one case than in another. In such cases, provided the judgment of a Court, or the finding of a jury, be founded upon a comparison of the description in the will with that of the subject which it is said to describe, the general principle of exposition above stated is strictly adhered to, and the intention of the testator never comes in question *except as it is expressed in his will*.

71. EXAMPLE 3.—As a knowledge of the nature, name, etc., of the subject intended by the testator is necessary for the purpose of enabling a Court to iden-

¹ Hobson v. Blackburn, 1 Myl. & K. 571. [Pye v. Bird, 2 Black. 130; Goodman v. Edwards, 2 Myl. & K. 759; Arkell v. Fletcher, 3 Jur. 1099; Hall v. Fisher, 1 Coll. 47.]

tify it; so, a knowledge of the circumstances by which a testator was surrounded at the time of making his will; the situation in which he stood with respect to the objects to which his will refers; and, generally, a knowledge of the state and circumstances of the testator, his family, and affairs, *may* be necessary for the same purpose.

72. Thus, the strict and primary sense of the word *child* is legitimate offspring.¹ Now, if a testator, having no legitimate child at the time of making his will, devise an estate to his child, describing such child in his will as a person then in being, or in any other terms amounting to a *designatio personæ*, the extrinsic circumstances of the case would necessarily exclude the primary sense of the word, and (as the testator must have meant *some* person) would let in the inquiry whether, in any popular or secondary sense of which the words were capable, they pointed out the testator's intention with certainty.

73. Again, suppose a testator to devise an estate to A. B., there being two persons, father and son, of the same name, and that the son only was known to the testator;—Or, suppose a testator resident in India, to bequeath to A. B., who was also in India, some specific chattel, *e. g.* a gold watch, and that the testator had with him, in constant use, a specific chattel of the kind described, and that he was also owner of another of the same description, which he had left in England twenty years before;—The meaning of the testator's words in both these cases, though equivocal in the abstract, is definite with reference to the circumstances under which they were used.²

¹ 1 Ves. & B. 466, and the references there. [3 Ves. & B. 67.]

² See and consider *Lepiot v. Browne*, 1 Salk. 7; *Thomas v. Steward*, 7 T. R. 144, n. (6); *Fonnereau v. Poyntz*, 1 Bro. C. C. 471; s. c. 6 Vesey,

74. In *Doe d. Gore v. Langton*,¹ the testator by his will, which was dated in February, 1831, devised "all that my manor or reputed manor of Barrow Minchin, in the county of Somerset, together with the mansion-house, called Barrow-Court, thereto belonging, and the park, and also all and singular my freehold messuages, lands, tenements, and hereditaments thereunto belonging, situate, lying, and being in the parish of Barrow Minchin and Barrow Gurney, in the county of Somerset aforesaid." The lands in question in the cause adjoined to, and were in some parts intermixed with, the ancient Barrow estate, which had been in the testator's family for several generations; they were situate in the parish of Barrow Minchin and Barrow Gurney, but were not within the manor of Barrow Minchin, and were purchased by the testator in October, 1800. The testator had some lands within both the parish and manor of Barrow Minchin. The argument for the plaintiff (the devisee) proceeded upon the manifest intention of the testator to dispose of all his estates, and the flexible meaning of the words "thereunto belonging." The counsel for the defendant (the heir-at-law) contended that the words "thereunto belonging" could not apply to newly purchased estates, which had never been held with the manor, or even been in the family of the testator before the purchase in October, 1800. That being conceded, it was contended that the description of the lands consisted of two necessary terms: one, that they be within the parish of Barrow Minchin and Barrow Gurney; another, that they belong to the manor of Barrow Minchin; that, as there were lands that cor-

401; 1 Mer. 389, 380; and see 8 Ves. 23; 10 Moore, 166. [King's College Hospital v. Wheildon, 18 Beav. 33; Jeffries v. Michell, 20 Beav. 15.]

¹ 2 B. & Adol., 680.

responded in both particulars with this description, and which undoubtedly passed by the devise, the words of the will were satisfied without being construed as carrying the lands in question; and that if they did not correspond with the description in both particulars, that is, if they did not belong to the manor and lie within the parish, evidence that the lands in question answered the description in the will, and that they had been occupied, and formed one estate with the manor, was undoubtedly admissible; but no such evidence was or could be given. Lord Tenterden, C. J., in delivering the judgment of the Court, said: "Our opinion in this case is founded upon the will of the testator, together with such only of the extrinsic facts as furnish the date of the purchase and the situation of the lands in question, and show that William Gore Langton, the defendant, was the eldest son of the testator, and had married a lady of fortune, and taken her surname of Langton in addition to his own; and that the ancient seat of the Gore family was at Barrow—the eldest son resided at Newton Park; *and all these facts were undoubtedly admissible in evidence.*"¹ After noticing some of the extrinsic facts of the case, his Lordship proceeded: "The question arises upon the use of the words, *thereunto belonging*, in the devise under which the plaintiff claims. It sometimes happens, that the language of one will is so nearly like that of another, as to make a decision upon the first a plain authority to govern the second; but this does not always happen, and very small changes of language have often led to a difference of interpretation. *The extrinsic facts in this case* leave no room to doubt that the testator intended his newly-acquired property to pass by his will,

¹ See *Lowe v. Lord Huntingtower*, 4 Russ. 532, n.

as part of his Barrow estate; but, nevertheless, it cannot pass, unless that meaning can be collected from the will itself; and there are two clauses in the latter part of the will, which appear to manifest that intention, and to be sufficient to authorize us to put such a construction on the words *thereunto belonging* as will accord with, and give effect to, that intention."

75. The admissibility of extrinsic facts in the cases stated under the third example, and in any cases analogous to them, without transgressing the strict limits of exposition, if not equally obvious as in those falling under the first example, is equally certain.

76. In considering questions of this nature, it must always be remembered, that the words of a testator, like those of every other person, tacitly refer to the circumstances by which, at the time of expressing himself, he is surrounded. If, therefore, when the circumstances under which the testator made his will are known, the words of the will do sufficiently express the intention ascribed to him, the strict limits of exposition cannot be transgressed, because the Court, in aid of the construction of the will, refers to those extrinsic collateral circumstances, to which it is certain the language of the will refers. It may be true, that, with such evidence, the precise meaning of the words could not be determined; but it is still the will which expresses and ascertains the intention ascribed to the testator. A page of history (to use a familiar illustration) may not be intelligible till some collateral extrinsic circumstances are known to the reader. No one, however, would imagine that he was acquiring a knowledge of the writer's meaning *from any other source than the page he was reading*, because in order to make that page intelligible, he required to be informed to what country the writer belonged, or to be

furnished with a map of the country about which he was reading.¹ The distinction pointed out in a former page² between the application of evidence to *explain a testator's words* and its application to *prove intention as an independent fact*, should here be recalled. The evidence for the admissibility of which we are now contending is of the former description. It does not *per se* approach the question of *intention*. It is wholly collateral to it. It explains the words only by removing the cause of their *apparent* ambiguity, where, in truth, there is no *real* ambiguity. *It places the Court which expounds the will in the situation of the testator who made it, and the words of the will are then left to their natural operation.*³

77. The propriety, and indeed the necessity, of thus referring to extrinsic circumstances, is strongly enforced by the consideration, that the same words, properly interpreted, mean different things under different circumstances. Thus, in the case of a bequest of 'stock,' 'jewels,'⁴ or 'household furniture,'⁵ different subjects are meant by a testator, accordingly as he may be a farmer or a merchant, a nobleman or a jeweller.⁶ To these observations also may be added the consideration that a bequest of 'stock,' 'jewels,' 'household furniture,' or any analogous bequest, though it may convey no certainty of the testator's intentions to the mind of a *stranger*; yet to any member of the testator's family, or any friend to whom he may have

¹ See *Hiscocks v. Hiscocks*, *infra*, pl. 183.

² *Supra*, pl. 9, 10.

³ See pl. 96, note, and *Gore v. Langton*, *ante*, pl. 74.

⁴ In *Colpoys v. Colpoys*, Jac. 461.

⁵ *Kelly v. Powlett*, Amb. 605.

⁶ [Similarly, a conclusion may be drawn, as to the meaning of the testator's words, from the profession or position in life of the legatee. See the case of a bequest of "books," *Willis v. Curtois*, 1 Beav. 193.]

ntrusted the execution of his will, the intention may be as clear and certain *by force of the words of the will alone*, as if the legatees in the one case, and the legacies in the other, had been described with the reatest technical precision. In the case suggested in

former page¹ of a bequest of a gold watch, no testator, if he had intended to bequeath the watch he had left in England, could possibly have thought the description he had used sufficient; any testator, however, intending that which he had with him in India, might reasonably think he had sufficiently described it, even if the fact that he was owner of the other also were present to his mind. To reject or exclude

knowledge of collateral circumstances in cases like these, would often make the sufficiency of a will depend upon the *casual* knowledge of an executor or trustee, rather than the sufficiency of the testator's words. The construction of wills giving legacies in the nature of portions may be used to illustrate the propositions now under consideration; the relation in which the testator and legatee stand to each other being made the round of a peculiar construction.²

78. The decision, in cases such as those suggested under the second example, would be, not that the testator *intended* merely to express this or that purpose, but that he *had*—perhaps inaccurately—expressed it.

79. The following hypothetical case may, perhaps, be considered as illustrating the extreme point to which the legitimate use of extrinsic evidence could be carried in cases falling within the example now under consideration. Suppose a legacy '*to one of the children of A.*' by her *late* husband B. Suppose, further, that A. had only one son by B., and that the

¹ *Supra*, page 149.

² *Stones v. Heurtley* 1 Ves sen 167. [Vide *supra* page 95 n. 4.]

fact was known to the testator. The necessary consequence, in such a case, of bringing the words of the will into contact with the circumstances to which they refer, must be to determine the identity of the person intended. No principle or rule of law would, it is conceived, preclude a Court from acting upon the evidence of facts by which the meaning of an *apparently ambiguous* will would, in such a case, be reduced to certainty. It is the form of expression only, and not the intention which is ambiguous. It would be quite another question if A. had more sons than one, or if her husband were living.¹

80. All the above observations are equally applicable to cases in which the description of the person or the thing intended by the testator is *upon the face of the instrument* inaccurately or imperfectly described² as to other cases; the authorities show, in the clearest manner, that evidence of the nature here spoken of is *in such cases*, admissible.³

81. EXAMPLE 4.—The legitimate effect of circumstantial evidence in cases in which the *quantity of interest* given by the will is the point in dispute, is not perhaps so well defined as in the cases which have already been stated. The proposition, however, that such evidence is admissible, where the quantity of interest is the point in dispute, is certain.

82. The arguments of the Court in *Pocock v. The*

¹ 2 Vern. 625.

² As to the distinction between an *ambiguous* description, and one which is merely *inaccurate*, see *infra*, pl. 208.

³ *Fonnereau v. Poyntz*, 1 Bro. C. C. 472, and see s. c. cited and commented on by Lord Eldon, 6 Ves. 401; *Attorney-General v. Grote*, 3 Mer. 316; s. c. on appeal, *infra*, Appendix No. II; *Abbot v. Massie*, 3 Ves. 148; *Price v. Page*, 4 Ves. 680; *Doe d. Smith v. Lord Jersey*, 2 Brod. & Bing. 553; s. c. *infra*, pl. 95, n.; *Colpoys v. Colpoys*, Jac. 451; *Goblet v. Beechey*, Appendix, No. 1.

Bishop of Lincoln,¹ fully recognize the particular point now insisted on. The circumstances of that case were not such as necessarily to exclude the supposition that the words, "perpetual advowson," upon which the question in that case turned, were used by the testator in their strict and primary sense; and the Court therefore properly refused to admit any other interpretation of the testator's words. But if, in that case, no state of circumstances could have been suggested, in which the devisee could possibly have been benefited by the devise, without departing from the strict and primary sense of the testator's words, the Court must, in favor of the testator's intention, have accommodated their meaning to the circumstances of the case, by analogy to the cases referred to under the first and second examples, and upon the same principle.

83. In the recent case of *Lowe v. Lord Huntingtower*,² a bill was filed for the specific performance of an agreement to purchase certain lands. The cause was heard before his Honor the Vice-Chancellor, on the 30th day of June, 1818, when the Court ordered, that a case should be made for the opinion of the Judges of the Court of King's Bench; and it was ordered, that the question should be:—Whether the plaintiff was seized of an indefeasible estate in fee simple, or of any and what other estate in the undivided moiety of the lands and hereditaments in question?

84. The case was argued in Trinity Term, 1823, and the Judges certified their opinion to be,—that the plaintiff was seized of an indefeasible estate in fee simple in the undivided moiety of the lands in question.³

85. A motion was afterwards made before his Hon-

¹ 3 Brod. & Bing. 27; and *supra*, page 72.

² 4 Russ. 532, n.

³ *Lowe v. Manners*, 5 Barn. & Ald. 917.

our the Vice-Chancellor, that the case upon which the Judges had given their opinion, as aforesaid, should be amended,—by stating therein *certain facts collateral to the will under which the estate was devised*; and that the case *so amended* should be sent back to the Judges for their opinion. The motion was supported upon a suggestion, that, if the facts sought to be introduced by amendment had been under the view of the Court, when the above-mentioned certificate was given, a different construction would have been put upon the will.¹

86. His Honor refused the motion.

87. The motion was afterwards made before the Lord Chancellor (Lord Eldon), when his Lordship made the following order:—"His Lordship doth order that the case whereupon the Judges of the Court of King's Bench have certified their opinion be amended, *by introducing therein a statement of the facts*, that, at the date of the will, the plaintiff, in the said bill and the said case named by the name of Drury, was a bachelor; that the testator's daughter, Anne Lowe, had attained the age of fourteen years; and Edward Miller Mundy had five sons; namely, Edward Miller Mundy, the younger, aged seven years; Godfrey Basil Maynal, six; George, four; Frederick, three; and Henry, two years, or thereabouts; and that, at the date of the codicil, the said plaintiff was a married man, and all the said sons of the said Edward Miller Mundy, the elder, were living, and bachelors; and that, at the time when the said testator's daughter, Anne Lowe, attained the age of twenty-one years, the said plaintiff was a married man; and, by inserting therein the following extract from the will of Lowe, the testator in the case named, (that is to say) 'Whereas, at this time I cannot ascertain

¹ Ex relatione.

r put a proper estimate upon my personal estate, and varieties of securities due to me, owing to the abuse of ricked and designing men; and consequently the getting in debts and securities due to me is precarious, and may fall short of what is justly due to me, at the same time can have no doubt that it must be considerably more than my debts and legacies can amount to—I will and desire my aforesaid executors will exert themselves in early applications, as from too much experience I have found that delays are dangerous, and no confidence is to be put in specious appearances and promises; and that, as soon as my debts and legacies, as aforesaid, are discharged, I will that, as soon as they shall have the sum of £500 in their hands, it shall be laid out in good security till it arrives to the sum of £5,000, and then laid out in land as near the parish of Danby as they meet with a purchase; and the next £5,000 to be laid out in land in the parish of Spoodon and Chaddesden, and as contiguous to Locko as a purchase may offer, and so alternately as it may arise.’—And it is ordered, that the said case, when so amended, be referred back to the Judges for their opinion,—*Whether the facts so introduced are admissible as evidence in the said case;* and if so, whether, on the case so amended as aforesaid, they are of the same opinion as before certified by them, or how otherwise? And his Lordship doth reserve the consideration of all further directions, until after the Judges shall have made their certificate; and any of the parties are to be at liberty to apply to the Court as they shall be advised.”¹

88. The amended case was argued before the Judges of the Court of King’s Bench on the 18th and 21st days of May, 1824, and the following certificate was

¹ Reg. Lib. B. 1821, fol. 2041.

returned by them:—"This case has been argued before us by counsel; we have considered it, and are of opinion, *that the facts ordered to be introduced into the case are admissible in evidence*; and, on the case so amended, we are of the opinion before certified.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

T. LITLEDALE."

89. On the 10th day of December, 1825, the cause came on upon the equity reserved, and a specific performance of the contract was decreed.

90. This case, which has been recognized in the recent case of *Miller v. Travers*,¹ proves in the clearest manner the right of a Court of law, where *the estate or quantity of interest* disposed of by a testator is in dispute, to look out of the will and be guided in the construction of it by the effect (if any) which the circumstances of the case may have upon it.

91. In *Gall v. Esdaile*,² which came before the Court upon a special case, the devise was as follows: "As to the rest of my estate, my two houses in S. and T. I give to my wife for life, and, after her decease, that in S. to my daughter, the other between my two sons. The rest of my estate, of what kind soever, one-third to my wife, and the rest equally among the three children." *The testator had no real property but the two houses.* The question was, whether the daughter took an estate for life, or an estate in fee, in those houses. Tindal, C. J., said: "It aids this construction (giving the daughter a fee) that the testator had no other real property;" and Alderson, J., said: "I should have had some dif-

¹ 8 Bing. 244.

² 8 Bing. 323 [and see 1 Russ. & Myl. 540].

iculty if the case had not stated that the testator had no other real property; but when that is stated, and the residuary clause may apply to personal property, the devise to the testator's wife and daughter, standing unconnected with the residuary clause, is sufficient to give the daughter a fee."¹

92. Another case in point is the construction of a devise to A. and his *heirs*, and if he shall die without *heirs*, then to B., where B. is capable of being collateral heir to A. In that case, the word *heirs* will be construed *heirs of the body*.² So, the effect of a devise to A., after the death of B., according to a well-known rule of law, will vary according to the relation in which A. and the testator stand to each other. 'If A. be heir-at-law to the testator, B. will take a life estate in the land devised. If A. be not heir-at-law to the testator, B. will take nothing.'³

93. The cases referred to in a former page⁴ in which the words *in default of issue* or on *failure of issue* have been construed to mean issue *living at the death of the testator*, illustrate the same point, although (as before observed) an important principle appears to be sacrificed by the decisions which have been come to in those cases.

94. EXAMPLE 5.—It is upon the principle before adverted to, namely, that all writings tacitly refer to the existing circumstances under which they are made, that courts of law admit evidence of particular customs and usages in aid of the interpretation of written instruments—whether ancient or modern—whenever, from the

¹ [See *Vick v. Sueter*, 3 Ell. & Bl. 219.]

² *Fearne*, 466; *Id.* 7.

³ *Horton v. Horton*, Cro. Jac. 74. [1 *Jarm. Wills*, 2nd ed. 445.]

⁴ *Supra*, pl. 50.

nature of the case, a knowledge of such customs and usages is necessary to a right understanding of the instrument.¹ The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed.

95. Examples illustrating the Fifth Proposition above stated might be multiplied without end.²

¹ 1 Phil. on Ev. 558, 7th ed. [Vol. 2, ch. 7, sec. iii, 9th ed.]

² In support of the general proposition, that Courts of law will look at extrinsic circumstances in aid of the construction of a written instrument, see per Lord Hardwicke in *Goodinge v. Goodinge*, 1 Ves. sen. 231; per Lord Thurlow, in *Jeacock v. Falkener*, 1 Bro. C. C. 295; in *Green v. Howard*, 1 Bro. C. C. 32; and in *Fonnereau v. Poyntz*, 1 Bro. C. C. 472; per Lord Loughborough, in *Mackell v. Winter*, 3 Ves. J. 540, 541; per Lawrence, J., in *Leigh v. Leigh*, 15 Ves. 92; per Lord Manners, C., in *Crone v. Odell*, 1 Ball & Bea. 480; per Sir T. Plumer, in *Beachcroft v. Beachcroft*, 1 Madd. 430; and in *Colpoys v. Colpoys*, Jac. 451; per Lord Eldon, in *Oakden v. Clifden*, Linc. Inn Hall, 1826, MS.; [per Sir L. Shadwell, in *Blundell v. Gladstone*, 11 Sim. 486.] See also *Lane v. Lord Stanhope*, 6 T. R. 345; *Doe d. Le Chevalier v. Huthwaite*, 3 Barn. & Ald. 632; *Doe d. Gibson v. Gell*, 2 B. & C. 680; *Pocock v. Bishop of Lincoln*, 3 Brod. & Bing. 27; *Alford v. Green*, 5 Madd. 95; *Goodwright v. Downshire*, 2 Bos. & Pul. 608; 1 New Rep. 344; *Wilde's case*, 6 Rep. 16; *Lansdowne v. Lansdowne*, 2 Bligh. 60; and see the arguments of counsel in the recent case of *Pycroft v. Gregory*, 4 Russ. 526; *Clementson v. Gandy*, 1 Keen, 309; *King v. Badeley*, 3 Myl. & K. 417; *Gord v. Needs*, 2 Mees. & Welsby, 149, *infra*, pl. 182; *Hiscocks v. Hiscocks*, 5 Mees. & Welsby, 363, *infra*, pl. 183; [*Reynolds v. Whelan*, *infra*, Proposition Seven.] The same principle of construction applies to deeds. There cannot, indeed, be any difference in this respect between deeds or other writings and wills. Deeds require particular words in particular cases to express a given purpose; but when that requisition is complied with, the rules of construction must be the same, for the intention is the object sought for in all alike. See *Wright v. Kemp*, 3 T. R. 470. Accordingly, in *Doe d. Jersey v. Smith*, 2 Brod. & Bing. 553, Bayley, J., says: "The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinct and accurately described; but, because there is an ambiguity upon the face of the instrument; because an indefinite expression is used, capable of being satisfied in more ways than one; and I look to the state of the property at the time, to the estate and interest the settlor had, and the situation in which she stood with regard to the property she was

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96. They appear to justify the conclusion, that every claimant under a will has a right to require a Court of construction, in the execution of its duty, shall—by means of extrinsic evidence—place itself in the situation of the testator, the meaning of whose language it is called upon to declare.”¹ It follows that,—*if with the light which that situation alone affords, the testator’s meaning can be determined by a Court, the Court which so determines does, in effect, declare that the testator has expressed his intention with certainty*, or, in other words, that his will is free from ambiguity.² There is no other criterion of legal certainty in a will.

ing, to see whether that estate or interest or situation would assist us in ascertaining what was her meaning by that indefinite expression.”

See also *Sir John Eden v. The Earl of Bute*, 3 Bro. P. C. 679; *Countess of Helbourne v. Inchiquin*, 1 Bro. C. C. 348; *King v. The Inhabitants of Don*, 8 T. R. 379; and per Ashurst, J., in *Doe v. Burt*, 1 Term. R. 708; *Vendors*, p. 142, 6th ed.; *Simons v. Johnson*, 3 B. & Adol. 175; *Whit v. Wilson*, 3 B. & Adol. 728; *Ponton v. Dunn*, 1 Russ. & Myl. 403; *supra*, pl. 58, n.

In the recent case of *Doe d. Templeman v. Martin*, as reported in 11 B. & Manning, p. 524, Parke, J., said: “I think facts and circumstances relating to the subject of the devise are admissible; such as possession by the testator, the mode of acquiring local situation, and the general state of the testator’s property. The Court may take such things into consideration, so as to put themselves in the place of the testator, and then see how the facts of the will affect the property.” And in *Guy v. Sharp*, 1 Myl. & K. 171, July, 1833, the Lord Chancellor said, “I may, however, observe generally, on the reception of extrinsic evidence, with a view to aid the construction and give explanation, not to alter or to control the sense—a *purpose for which it can never be received*—that there is a manifest difference between the declarations, whether verbal or written, of a testator, and the facts of facts and circumstances, by the knowledge of which the Court, when called upon to construe, may be placed in the same situation with the testator who made the instrument, and may thereby be the better able to understand his meaning.” [*Thompson v. Hempenstall*, 13 Jur. 815; *Doe d. Thomas v. Beynon*, 12 Ad. & Ell. 431.]

¹ *Infra*, pl. 198–204.

97. The case of *Doe d. Oxenden v. Chichester* (*supra*, p. 72) may at first sight appear at variance with the generality of the conclusion stated above; but, in reality, it is not so. It was decided, in that case, that the words of the will were sensible as they stood, *with reference to extrinsic circumstances*, and the evidence was tendered for the express and admitted purpose of proving, that the testator meant something different from what his words, *strictly interpreted*, expressed. This, according to the Second Proposition stated above, could not be done.

[Parol evidence in aid of the construction is admitted more freely in America than in England.¹ In New York, however, the English rules are strictly enforced,² and parol evidence is only admitted to explain a latent ambiguity.³

[In *Perkins v. Jewett*,⁴ parol evidence was received of the purposes for which a testator bought a certain homestead, in order to determine whether it passed under a devise of a "house-lot," although the devise could be satisfied without recourse to parol. But, this decision can hardly be relied on as having any authority of a general nature, or as applicable to circumstances at all different from those respecting which it was pronounced.

[Parol evidence was held admissible in *Ennis v. Smith*⁵ to explain the meaning of the phrase "all my effects." In *Smith v. Bell*,⁶ it was also held that parol evidence of the situation of the parties was admissible in aid of ambiguous expressions. On the other hand, it has been decided in *Wilkins v. Allen*,⁷ and *King v. Ackerman*,⁸ that extrinsic evidence is not admissible to control the interpretation of a will, but only to explain a latent ambiguity. This is the well understood rule of the New York courts.

¹ See *Sargent v. Towne*, 10 Mass. 303.

² *Mann v. Mann*, 14 Johns. 1; *Jackson v. Sill*, 11 Johns. 201.

³ See *Tole v. Hardy*, 6 Cow. 333; *Allen v. Allen* 18 How. U. S. 385.

⁴ 11 Allen 9; see *Fisher's Digest*, Title Will, § 3.

⁵ 14 How. (U. S.) 400.

⁶ 6 Pet. 68.

⁷ 18 H. 385.

⁸ 2 Bl. 408; See *Warner v. Brinton*, 15 Haz. Pa. Reg. 49.

[Evidence is not admissible in America to show that the word "heir" in a will means any one but a statutory (not the common law) heir. The American law, therefore, *semble*, appears to admit of parol evidence more readily in respect to the subject than to the object of a bequest if the gift is couched in general terms, such as to one's "heirs," "relations," &c. It cannot, however, be too emphatically or too often stated that the tendency of modern decisions in all the States is to approximate to the New York rule, which admits of parol evidence only in the case of a latent presumption or an ambiguity, that is to say, when the primary sense of the terms in the will fit no subject or object in particular.

[In England, too, there is a progressive tendency to solve an ambiguity by construction, if possible, and not by extrinsic evidence. The maxims *error hominis* and *falsa demonstratio* are much used for this purpose both in England and in the United States, although not unfrequently the description prevails over the name.¹ In this branch of law the late cases alone need be regarded as having any authority on a doubtful point.

[In the case of *Hone v. Kent*,² parol evidence was admitted to show what volumes of the commentaries the Chancellor had at the time he made his will, in order to determine whether a new edition of his work was comprised under a specific bequest of "unsold commentaries on hand," or under a specific bequest of the copyright. A different conclusion would probably be arrived at in England. The will spoke only from the death of the testator, as regarded the Chancellor's personality, and as to the edition which was being printed there were copies on hand. The case was one, it would seem, more proper for construction than for parol evidence.

[*Semble*, parol evidence will be admitted to show that a testator was in the habit of using the word "appurtenances" in a certain sense.³ The term sometimes passes land in a will. Of course, if the gift cannot be satisfied at all according to

¹ Wagner's App. 43 Penn. St. 102; see Greenleaf on Evidence, vol. I, 289.

² 6 N. Y. 380; reversing s. c. 11 Barb. 315.

³ *Gulliver d. Jeffries, v. Poyntz*, 2 Bl. 726.

the primary sense of the terms used, parol evidence is admissible of the testator's habits. But, in the United States evidence of such habits is sometimes admitted, not merely to give words some force, but to *extend* their meaning.¹ This is never allowed in England if the primary sense of the terms is at all sensible and operative.

[In *Gulliver d. Jeffries v. Poyntz*,² two closes of meadow and six acres of arable land and a house were conveyed to the testator as "a messuage or tenement with the appurtenances." They were held to pass under a devise of "three messuages, with all houses, barns, stables, stalls, etc., that stand upon or belong to the said messuages." This extension of the meaning of the term messuage was adopted by the light thrown on the case by parol evidence. *Jarman*,³ however, considers that such evidence would not now be admitted, and that the case, therefore, is infirm. On principle, the evidence seems to be inadmissible if the word appurtenances could be otherwise satisfied. The case would, however, doubtless be followed in America, and parol evidence be received here of the local meaning attributed to the terms "appurtenances," "farms," "messuage," &c.³

[The singular number will not always carry the plural; nor is parol admissible in England to show that the testator meant the plural.⁴ The case cited would probably be differently determined in the United States. The testator devised his close in the occupation of J. W. He had two closes in the occupation of J. W. It was held that the devise was void for uncertainty, as the parol evidence only showed that the testator intended to comprise both closes under the singular number. Now, the want of any specification of parcels by the testator showed that he meant to devise both. The contrary rule, however, has been established since Lord Bacon's time:⁵ or, rather, an equivocation is presumed, so as to admit of the

¹ *Ferguson v. Mason*, 2 Sneed, 618; *Gunnaway v. Shapley*, 1 Caldwell, 572; *Sutton v. Sutton*, 5 Harring, 459; see, however, *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Weston v. Foster*, 7 Met. 297.

² 2 Bl. 726; s. c. 3 Wils. 141; 1 *Jarman*, 708.

³ *Aldrich v. Gaskill*, 10 Cushing, 155.

⁴ *Richardson v. Watson*, 4 Barn. & Ad. 787.

⁵ See *infra*, pl. 197.

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uction of parol evidence of intent. But, why should not parol evidence be as competent to pass both closes as to signify which of the two was intended to be conveyed by the testator. Besides, when a proprietor classifies all his lands as estate, manor, or close, this is in the nature of a pet or nick name under proposition four. When the gift is thus both sensible as uncertain and equivocal, the parol evidence ought, in principle, to be admitted to pass all that the testator intended.

[In *Doe v. Allen v. Allen*,¹ a testatrix devised land to her son T. A. for his life, and after his decease, to John A., son of her said brother, T. A., his heirs and assigns, charged nevertheless with the bequest of £100 to each and every of the brothers and sisters of the said John A. At the time of making the will, there were two grandsons of T. A. named John, but one of them only had brothers and sisters.

The court, nevertheless, held that parol evidence was admissible in aid of the construction, inasmuch as the bequest in the will would apply to the second T. A., as he might in time to come have brothers and sisters.²

Parol evidence is not admissible of the testator's declarations at the time of his making the will that a devise to children was not to include his daughters,³ nor can the acquiescence of a married daughter be relied on for that purpose.⁴ The testator's declaration, too, that he makes a will merely because he was about to go on a journey, does not render the will contingent in any manner upon his return or non-return.⁵

Oral evidence is admissible to show that a person who left the testator's service was still regarded by him as his servant, and of the class to whom a bequest to servants should apply.⁶ This ruling is inconsistent with principle, and is calculated to knock down *pro tanto* the existing securities against nuncupative wills. Although relations by affinity are not, as a rule,

¹ Jurist, 985.

See, however, *Osborne v. Varney*, 7 Met. 301.

Weatherhead v. Baskerville, 11 H. 329; see *Shearman v. Angel*, Bailh. 351.

⁴ *Ib.*

Farver v. Tarver, 9 Pet. 174; see *Gregory v. Cowgill*, 19 Mo. 415.

Herbert v. Reid, 16 Ves. 481.

comprised under general terms designating kindred, yet, parol evidence is admissible to show that the word nephew means nephew of testator's wife.¹ The case is, as it were, one of a nick or pet name. The court, however, in *Grant v. Grant*, considered that the primary sense of the word nephew included nephews by affinity.

[The principle established by the last two cases cited appears to be that a generic name, such as "servant," "nephew," is to be very liberally construed, and that, even where it is sensible and operative according to its popular signification, yet, that its legal primary meaning is more comprehensive than the popular sense. "Servants" may thus mean past, present, or future servants, and nephew may denote a wife's nephew. These cases, and the inferences to which they lend support, are wholly contrary to principle, and to proposition two of Sir James Wigram's axioms. They are in harmony, however, with the received law of parol evidence in some of the United States, but are wholly at variance with the current and tendencies of both the British and American courts. The authority of these cases, therefore, is not likely to be permanent. It is morally certain that they will be overruled. If *Grant v. Grant* continues law, why may not "children" include stepchildren,² or illegitimate children?³

[Where a will does not apply with equal clearness to the different claimants, the case, in point of principle, seems to be one of construction, and not of extrinsic evidence, even though the will describes each of the claimants with sufficient legal clearness, if the others were not in question.⁴ In such cases, however, parol evidence of the testator's circumstances will be admitted in England,⁵ and of his intent in America.⁶

[In the construction of ambiguous expressions in a will, the ties which connect the testator with his legatees, and their mutual relationships, are all matters to be considered,⁷ if the

¹ *Grant v. Grant*, 18 W. R. 230.

² *Contra*, *Fouke v. Kemp*, 5 Har. and I. 135.

³ *Contra*, 2 Sneed, 618.

⁴ *Doe d. Westlake v. Westlake*, 4 B. & Ald. 57.

⁵ *Hiscocks v. Hiscocks*, pl. 183.

⁶ *Ex parte Hornby*, 20 Brad. Sur. 420.

⁷ *Smith v. Bell*, 6 Pet. 68; see *Warner v. Brinton*, 15 Haz. Pa. Reg. 49.

description in the will is either inaccurate or ambiguous. But no extrinsic evidence can either enlarge or abridge the interest conferred in the will,¹ and if the terms of a will are insufficient to disinherit the heir, they cannot be aided by extrinsic evidence.²

[It is not, however, every error in description that will admit of extrinsic evidence. Some particular person may be so described, as that upon the construction no doubt can be entertained that he was the person intended, although he is misdescribed in some respects. For instance, in *Delmare v. Lobello*,³ Lord Thurlow, even held that a nun might get married and have children, and consequently, as she suited the description in the will in every respect, there was no ambiguity, and no ground for the application of extrinsic evidence. There is no fault to be found with this ruling, if the nun was young enough to have had children. Her religious name was, as his lordship suggested, but a part of the profession, and was not meant for the rest of the world. But, as she must have been of age when she became professed, and had been thirty years a nun at the date of the will, it is obvious that there was a latent ambiguity sufficient to admit of parol evidence.

[In *Holmes v. Constance*,⁴ there was a legacy to the children of Robert Holmes, "late of Norwich, but now of London." A person of this name had gone from Norwich to London at the age of fourteen, and had died in London a few years before, leaving a child. The legacy was claimed, however, by the children of George Holmes, who was a relative of the testator and had been formerly of Norwich, but was then resident in London and had several children, some of whom were intimate with the testator. Sir W. Grant, however, would not admit parol evidence to this effect. His honor considered that the description was not so inapplicable to Robert as to admit of extrinsic evidence. His Honor also considered that George was the person intended, that the meaning of the word late was not recently, but formerly, and that the testator might not have been aware

¹ *King v. Ackerman*, 2 Black. 408.

² *Allen v. Allen*, 18 How. (U. S.) 385.

³ 1 Ves. Jun. 412 Sumner's ed. note *supra*, p. 70.

⁴ 12 Ves. 269. See *Doe d. v. Westlake*, 4 B. & Ald. 57.

of George's death. It is not easy to reconcile this case with the host of similar instances of defective description, to explain which parol evidence has been admitted.

[In New York, however, the relative situation of the testator's children cannot be shown by extrinsic evidence, if there is no change in their circumstances between the making of the will and an alleged revocation thereof.¹

[It sometimes seems hard to determine whether a case falls under Proposition Three or Seven; in other words, whether parol evidence may be admitted only of the circumstances of the testator, and not directly of his intent and declarations respecting the meaning he attached to the expressions in his will. For instance, in the case of *Smith v. Smith*,² a legacy was left to Mary S., wife of Nathaniel S. Her husband's name, however, was Abraham, but Sarah S.'s husband's name was Nathaniel S. Upon the extrinsic evidence and circumstances it was held that Mary S. was the person intended. This was a case which would seem to fall properly under Proposition Three. There was not an absolute necessity to resort to extrinsic evidence at all in aid of the construction. The court might at once decide that the person intended was Mary S., and that the erroneous description of her husband was merely so much false demonstration. As the court could dispense with parol, therefore, it seems to follow that it should necessarily have done so, except the case should be deemed to fall under Proposition Four, according to which pet names, names by repute, and familiar designations may be proved by parol. If it were thus proved that the testator used to call Sarah S. by the name of Mary, this evidence would be admissible, and would be the means of passing the property to Sarah. But, where the ambiguity did not spring from this source, but was owing to false demonstration, the case would seem to fall under Proposition Three, and parol evidence not to be admissible of the testator's intention.

[In cases like that of *Smith v. Smith*, the most important part of the description is the name of the legatee. Any false addition will generally be rejected as surplusage, and will not

¹ *Betts v. Jackson*, 6 Wendell 173.

² 1 Edw. ch. 189; s. c. 4 Paige, 271.

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by the gift with it. *Vernor v. Henry*¹ was a case of this description. A legacy was given to "James Vernor Henry hew," and son of Elizabeth, a deceased sister of the testa-

James Vernor Henry, and Robert R. Henry, each med the legacy on the following grounds. James was not hew but grand-nephew to the testator, and was not the son the grand-son of Elizabeth. Robert, on the other hand, nephew to the testator, and only surviving son of Elizabeth at the date of the will. Upon the extrinsic evidence, the rt held James to be entitled. Even when parol evidence is mitted, its weight is often affected by its relations to the and the rules of construction which are temporarily suspended for its admission. In the case last cited, for instance, question seemed properly to fall under the head of *veritas vinis*, etc., and not to be open to parol evidence at all in aid he construction.

[Parol evidence is never admitted to show the quantity of rest intended to be conveyed. In *Strode v. Lady Falkland*,² letters and oral declarations of the testator were offered how what the testator intended to include under the clause l other my lands, tenements, and hereditaments, out of lement." But the court rejected the evidence and alleged t the will should stand or fall on its own terms, where the lence adduced related to the intention of the testator. But, if parol testimony went to show not merely what lands were of settlement, but also the quantity of interest intended to conveyed, the court would have rejected even evidence of testator's circumstances as well as of his intention.³

[As Sir James Wigram observes, the cases he comprises under the Fifth Proposition are really included under Proposition ree, or else they belong to Proposition Seven. Latent ambiguities can arise only with respect either to the subject or object the gift. All extrinsic evidence admissible under Proposition Five is thus equally admissible under Proposition Three. Proposition Four relates rather to judicial cognizance than to dence.

¹ 3 Watts, 385.

² 3 Ch. Cas. 98; see *Mann v. Mann*, 14 Johns. 1; 1 Greenl. Ev. 290.

³ *Rogers v. Wheeler*, 22 Wendell, 148.

[Parol evidence is inadmissible to raise a case of election.¹ The cases cited show that the law on this point has been completely settled since Sir James Wigram wrote.²

[As it is also the tendency of modern cases to transfer questions of description from the sphere of parol evidence to that of construction, it is extremely doubtful whether parol evidence would, at the present day, be admitted directly in any of the United States to show the quantity of interest intended to be given to a beneficiary by will, although the high authority of Sir James Wigram appears in Proposition Five to be in favor of admitting such evidence. No case has yet been decided in accordance with his opinion on this point. It seems, therefore, to be certain that the quantity of interest intended to be conveyed never can be proved by parol. But, if a certain disposition in a will is wholly insensible in one sense of its terms, this may indirectly show what interest is conveyed by another gift in the same will. An exception thus often aids the construction. On the other hand, where another or a residuary limitation is sensible, this will, of course, not cut down a previous sensible gift of a fee or other absolute interest. This was all that was decided in *Gall v. Esdaile*.³ The court considered that a specific devise in that case was sufficient in its terms to pass a fee. The fact, that the testator had no other real estate than certain houses thus devised, showed also that the residuary clause was unconnected with the devise of realty, and did not modify the primary sense of its terms. But, no parol evidence was admitted except on the question whether each clause was sensible or not. The ulterior question, what quantity of interest passes, is always one of construction.]

98. In limiting the evidence spoken of in the Fifth Proposition to *material* facts, the generality of the Proposition contended for, respecting the admissibility of *explanatory evidence*⁴ in aid of the exposition of wills, is

¹ *Clementson v. Gandy*, 1 Keen, 309; *Stratton v. Best*, 1 Ves. jun. 285; Sumners, ed. note 2, by M. Hovenden; *Doe d. Chichester*, 4 Dow. 76, 89, 90; see *Waters v. Howard*, 1 Maryland, ch. Dec. 112; *Dixon v. Sampson*, 2 You. & C. 556; 1 Jarm. 393, *et sequ.*

² *Supra*, pl. 48.

³ 8 Bing. 323.

⁴ Prop. V.

no degree broken in upon. This limit is imposed by the general laws of evidence, and not by anything peculiar to the subject to which it is here applied. The only question to which this particular subject gives rise, is this: By what tests is the materiality of a given fact to be tried? The answer to this question must be taken from the general laws of evidence, and will be found to present itself in a clear and practical form.

99. Thus, the Second Proposition (p. 66) asserts, that where the words of a will, strictly construed, *are sensible with reference to extrinsic circumstances*, their strict and primary meaning, and no other, shall prevail. It will follow that any fact, which, *according to the ordinary rules of evidence*, would prove or tend to prove that the *circumstances of a case* were such as to admit of the testator's words being strictly construed, or that they were not capable of a strict construction, would be *material fact*, within the meaning of the Fifth Proposition.

100. Again, the Third Proposition (p. 103) asserts, that where the words of a will, strictly interpreted, are *sensible with reference to extrinsic circumstances*, a secondary sense of the words may be put upon them provided the *circumstances of the case* be such as to satisfy a court that the testator (who must have had some meaning) intended that which is ascribed to him. From this, it will follow, that any fact will be material, in cases falling under the Third Proposition, which, *according to the ordinary rules of evidence*, proves, or tends to prove, that the *circumstances of the case* are such as to admit of or require the secondary interpretation of the words which may be contended for, and evidence of an opposite tendency must, upon general principles, be admissible also.

101. The Fourth Proposition requires no comment in this place.

102. It is obvious, from the preceding observations, that the *purpose* for which extrinsic evidence may be adduced in a suit to execute or avoid a will, may undergo *successive* changes; for the first question will be, whether the words are sensible as they stand; and, if that question be answered in the negative, a second will arise, namely, whether their meaning is clear in any other sense. It is obvious, therefore, that the question of materiality must shift with *the succession of purposes* for which the evidence may be adduced.

103. In practice, an opportunity will generally offer of objecting to the admission of evidence, the materiality of which is questionable, as in *Doe d. Oxenden v. Chichester*,¹ and *Mounsey v. Blamire*;² and upon the discussion to which the objection will give rise, the materiality of the evidence will be considered and determined, and the evidence will be admitted or rejected according to the determination. Where no such opportunity offers, it seems, from the case of *Lowe v. Lord Huntingtower*,³ and *Doe d. Templeman v. Martin*,⁴ that the courts will, *in the first instance*, admit evidence of any facts, which, from their nature, may bear upon and influence the construction of the will, although no effect may, in the event, be given to such evidence. If, however, the facts tendered be such that they cannot, from their nature, be material, the court will at once reject them.⁵ Therefore, evidence of the amount of a testator's personal estate, at the time of making his will, though a mere fact unconnected with the question of the testator's intention, is, in general, inadmissible. The reason

¹ *Supra*, pl. 34, 97.

² *Supra*, pl. 36.

³ *Supra*, pl. 83.

⁴ 4 B. & Adol. 771; *supra*, pl. 96, note.

⁵ [See per Sir James Wigram, in *Sayer v. Sayer*, *supra*, page 78, note.]

is obvious. The will, *quoad* the personal estate, speaks from the death of the testator, and consequently its amount at the time of making the will, although it might bias the judgment, could not, in general, form a just ground of inference as to the meaning of the testator's words. Such evidence, however, may, under special circumstances, be material, and then it will be admissible.¹

104. Where the inquiry is, what the words of a will express, as distinguished from what the testator meant by the words, evidence of *declarations of intention*, of *instructions* given by the testator for preparing his will,² or any evidence of a similar nature, is obviously inapplicable to the point of inquiry. Such evidence, therefore, is, for the purpose of such an inquiry, inadmissible.³ Declarations by the testator, on a point collateral to the question of intention, may, however, be evidence of an *independent fact*, material to the right interpretation of the testator's words. Such evidence will, then, upon the general principle,⁴ be admissible.⁵ No fact (it may be observed), as a general proposition, can be material, which is not coincident in point of time with the making of the will.⁶

¹ Barksdale v. Gilliat, 1 Swanst. 562; Fonnereau v. Poyntz, 1 Bro. C. 471; s. c. cited 6 Ves. 401; Colpoys v. Colpoys, Jac. 451.

² [Bernasconi v. Atkinson, 10 Hare, 345.]

³ See cases collected, *infra*, pl. 121, notes, and pl. 124.

⁴ *Supra*, Prop. V.

⁵ Herbert v. Reid, 16 Ves. 484; Goodtitle v. Southern, 1 M. & Selw. 299; Benson v. Wittam, 2 Sim. 493; Powys v. Mansfield, 3 Myl. & Cr. 359. Blundell v. Gladstone, 11 Sim. 467.]

⁶ 5 B. & C. 69, in Doe d. Winter v. Perratt.

PROPOSITION VI.

Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases, see Proposition Seven) will be void for uncertainty.¹

105. The observations already made (if well founded), establish the right of every claimant under a will to bring under the view of the court which is to expound it, every material fact to which the will expressly

¹ Of certainty in a will, see *infra*, pl. 126. ["We ought not, without absolute necessity, to let ourselves embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning we should give it, that the will of the testator may be operative; and where two or more meanings are presented for consideration, we must be well assured that there is no sort of argument in favor of one view rather than another, before we reject the whole. It is true, the heir-at-law shall only be disinherited by clear intention; but if there be ever so little reason in favor of one construction of a devise rather than any other, we are at least sure that this is nearer the intention of the testator, than that the whole should be void and the heir let in. The cases where courts have refused to give a devise any effect on the ground of uncertainty, are those where it was quite impossible to say what was intended, or where no intention at all had been expressed, rather than cases where several meanings were suggested and seemed equally entitled to the preference. On this head it may further be observed, that the difficulty of arriving at a conclusion—even the grave doubt which may hang round it—certainly the diversity and the conflict of opinions respecting it, and the circumstances of different persons having attached different meanings to the same words, form no ground whatever of holding a devise void for uncertainty. The difficulty must be so great, that it amounts to an impossibility; the doubt so great, that there is not an inclination of the scales one way, before we are entitled to adopt

or tacitly refers; they establish, that courts of law recognize that natural dependence which exists between language and the circumstances with reference to which it is used, and which makes a knowledge of such circumstances necessary to a right interpretation of the language; and consequently, that a reference to such circumstances, in expounding a will, is strictly consistent with the office simply of determining the meaning of the testator's words.

106. Now, suppose the language of the will, notwithstanding the light thrown upon it by evidence of the facts to which it has reference, to be so equivocal or obscure as to leave the testator's intention in uncertainty. This uncertainty may present itself under different forms—either the language of the will may be capable of more than one meaning, or it may be incapable of any certain meaning. Shall the will, in either of such cases, be void for uncertainty—or shall the claimant be at liberty, to prove, by parol evidence, what the testator (who must be presumed to have had some meaning) *intended to have expressed*?

107. This question (regard being had to the stage of the investigation in which it is proposed) supposes every legitimate process, by which the intention ascribed to the testator could be extracted from his words, to have been ineffectually exhausted. The question, therefore, in its extreme form, is—whether the courts can admit evidence which, *passing by the written*

the conclusion. Nor have we any right to regard the discrepancy of opinions as any evidence of the uncertainty, while there remains any reasonable ground of preferring one solution to all the rest. The books are full of cases, where every shift, if I may so speak, has been resorted to, rather than hold the gift void for uncertainty." Per Lord Brougham, 6 Mann. & Gr 359. See, also, *Mason v. Robinson*, 2 Sim. & St. 295; *Adams v. Jones*, 1 Hare, 485.]

will, makes the *intention* of the testator, as an *independent fact*, the direct and immediate subject of proof; in other words—whether a nuncupative will may be added to a written will? The rule of the common law before adverted to, and the letter of the statute, both require that the answer to this question should be in the negative.

108. The general proposition, that a written instrument cannot be contradicted, varied, or added to, by parol evidence, has never been disputed; but some judges appear to have entertained an opinion, that if the words of a will were susceptible of different interpretations, a court might inform itself *abunde* of the *intention* of the party who used them, for the purpose of applying the words of equivocal import in the sense which that intention required.

109. Thus—Lord Chancellor Cowper, in *Strode v. Russell*, upon the authority of Cheyney's case,¹ to which he referred, was of opinion² that, where the words of the will stood *in equilibrio*, and were so doubtful that they might be taken one way or another, it was proper that evidence³ *in all cases* should be read to explain them; and this appears to have been frequently done by the same learned judge.⁴ And in *Hampshire v. Pierce*,⁵ Sir John Strange, M. R., is reported to have said: "The distinction as to admitting parol evidence I have always taken to be, that in no instance shall it be admitted in contradiction to the words of the will; but if the words of the will are doubtful and ambiguous, and

¹ 5 Rep. 68.

² *Strode v. Russell*, 8 Vin. Abr. 194; pl. 23; s. c. 2 Vern. 620.

³ "Declarations of the testator;" 2 Vern. 623.

⁴ Per Lord Hardwicke, C., 2 Atk. 374.

⁵ 2 Ves. sen. 216. See observations upon this case in *Hiscocks v. Hiscocks*, *infra*, pl. 183.

unless some reasonable light be let in to determine them, the will must fall to the ground; *anything* to explain, not to contradict, the will, is always admitted." However, Tracey, J., who assisted Lord Cowper in deciding the case of *Strode v. Russell*, dissented from him in respect of admitting the evidence.² Lord Hardwicke has recorded his disapprobation of Lord Cowper's rule;³ and Lord Cowper himself qualified the opinion he expressed, by saying: "We will consider how far it be allowed, and how far not, after it is read; and this is not the case of evidence to a jury, who are easily biassed by it, which this court is not."⁴ The case of *Hampshire v. Pierce* did not require a judicial opinion so broad as that attributed to the Master of the Rolls and his attention was not called to the distinctions pointed out in this work. In the recent case of *Richardson v. Watson*,⁵ as reported in B. & Adol., Parke, J., is reported to have said: "Evidence might be given to *show that the testator used the word close in the sense which it bore in the country where the property was situated as denoting a farm.*" In the report of the same case, in 1 Nev. & Manning, 575, the same part of the judgment is thus given: "Evidence as to the meaning of the word *close* in the will would have been admissible." The latter, it is conceived, must be the correct reading of the passage; for, from the tenor of the judgment in the case, it is clear that evidence could not have been held admissible to prove in what sense the testator used the word *close*, except so far as such proof was a consequence of the fact that *close* and *farm* meant the same thing.

120. The remaining cases applicable to the Sixth Proposition are numerous and decisive, and appear t

¹ "Declaration of the testatrix;" 2. Ves. sen. 218.

² Vern. 624; 2 Atk. 374.

³ In *Ulrich v. Litchfield*, 2 Atk. 37

⁴ 8 Vin. Abr. 194, pl. 23.

⁵ 4 B. & Adol. 787.

conclude the question now under consideration, and to decide in conformity with principle,¹ that, if a testator's words, aided by the light derived from the circumstances with reference to which they were used, do not express the intention ascribed to him, evidence to prove the sense in which he intended to use them, is, as a general proposition,² inadmissible—in other words, that the judgment of a court in expounding a will must be simply *declaratory* of what is *in* the will.

121. Thus it has been laid down (either in *dictum* or decision), that evidence is inadmissible for the purpose—1, of filling up a total blank in a will;³ or 2, of inserting a devise omitted by mistake;⁴ or 3, of proving what was intended by an unintelligible word;⁵ or 4, of proving that a thing *in substance*, different from that described in the will, was intended;⁶ or 5, of changing the person described;⁷ or 6, of reconciling conflicting clauses in a will;⁸ or 7, of proving to which of two antecedents a given relative was intended to refer;⁹ or 8, of explaining or altering the estate;¹⁰ or 9, of proving which of several testamentary guardians was intended to have the actual care of children;¹¹ or 10, of proving

¹ *Supra*, pl. 9, 10.

² See the exception, *infra*, pl. 130, et seq.

³ *Baylis v. Attorney-General*, 2 Atk. 239; *Castledon v. Turner*, 3 Atk. 257; *Hunt v. Hort*, 3 Bro. C. C. 311. [*Taylor v. Richardson*, 2 Drew, 16.]

⁴ *Lady Newburgh's case*, 5 Madd. 364; *Anon.* 8 Vin. Abr. 188, G. a, pl. 1.

⁵ *Goblet v. Beechey*, App., *infra*, No. 1, and 3 Sim. 24.

⁶ Per M. R. in *Selwood v. Mildmay*, 3 Ves. jun. 306.

⁷ *Delmare v. Robello*, 1 Ves. jun. 412; and see per M. R. in *Beaumont v. Fell*, 2 P. Wms. 140.

⁸ Per Lord Hardwicke, C., in *Ulrich v. Litchfield*, 2 Atk. 372.

⁹ *Lord Walpole v. Lord Cholmondeley*, 7 Term R. 138; *Castledon v. Turner*, 3 Atk. 256.

¹⁰ *Cheyney's case*, 5 Rep. 68.

¹¹ *Storke v. Storke*, 3 P. Wms. 51; 2 Eq. Abr. 418, pl. 13; *contra*, *Anon.* 2 Ves. sen. 56. The admissibility of evidence in this case may be satisfac-

what was to be done with the interest of a legacy till the time of payment;¹ or 11, of proving that, by a bequest of residue, a particular sum was intended;² or 12, of construing the will with reference to the instructions given for preparing it;³ or 13, of proving that an executor was intended to be a trustee of residue for benefit of kin;⁴ or 14, of proving that an executor was intended to take beneficially, where, upon the face of the will, it was conclusively apparent that he was intended to be a trustee;⁵ or 15, of controlling a technical rule of verbal construction;⁶ or 16, of explaining the sense in which the word "relations" was intended to be used;⁷ or 17, what a testator intended to give by the word "plate";⁸ or 18, what a testator intended to devise by the words "lands out of settlement";⁹ or 19, of proving that a portion was intended to be a satisfaction of a bequest of residue;¹⁰ or 20, that a legacy in a codicil was intended to be a substi-

orily explained; for, if guardians disagree, the Court has jurisdiction independently of the will, and then the evidence may be resorted to as a guide for the independent judgment of the Court.

¹ *Mansel v. Price*, Sugd. Vend. 138, 6th ed.

² *Brown v. Langley*, 2 Eq. Abr. 416, pl. 14; and 8 Vin. Abr. 197, l. 36. See *Dyose v. Dyose*, 1 P. Wms. 305, disapproved by Lord Burrows in *Fonnereau v. Poyntz*, 1 Bro. C. C. 472, and by Sir W. Grant, M. R., in *Page v. Leapingwell*, 18 Ves. 466; and see 1 P. Wms. 36, n.

³ *Goodinge v. Goodinge*, 1 Ves. sen. 230; *Murray v. Jones*, 2 Ves. & 318. [*Bernasconi v. Atkinson*, 10 Hare, 348.]

⁴ *Bishop of Cloyne v. Young*, 2 Ves. sen. 95; *White v. Williams*, Coop. 3; *Langham v. Sandford*, 2 Mer. 17. ⁵ s. c.

⁶ Per Lord Kenyon, C. J. and Lawrence, J. 6 T. R. 252, 354.

⁷ *Goodinge v. Goodinge*, 1 Ves. sen. 230; *Edge v. Salisbury*, Amb. 70; *Green v. Howard*, 1 Bro. C. C. 31.

⁸ *Nicholls v. Osborn*, 2 P. Wms. 419; *Kelly v. Powlet*, Amb. 605.

⁹ *Strode v. Russell*, 2 Vern. 621.

¹⁰ *Freemantle v. Bankes*, 5 Ves. 85.

tution for a legacy in the will;¹ or 21, of proving that a devise to a wife was intended to be in bar of dower;² or 22, of supplying a use or trust;³ or 23, of ascertaining whether the real estate was charged with the payment of debts in aid only, or in exoperation of the personal estate;⁴ or 24, of proving that the intention, in appointing a debtor to be executor, was to release the debt;⁵ or 25, of rebutting a presumption which arises from the construction of words simply *qua* words⁶; or 26, of raising a presumption;⁷ or 27, of increasing a legacy;⁸ or 28, of increasing that which is defective;⁹ or 29, of adding a legacy to a will;¹⁰ or 30, of proving what interest a legatee was intended to take in a legacy;¹¹ or 31, of ascertaining an intention which upon the face of the will was indeterminate, as in the case of a devise to one of the sons of A., who hath several sons;¹² or 32, of proving that words of limitation were intended to be construed as words of purchase;¹³ or 33, of proving that executors who had acted in part, and then renounced, were intended by the testator to act only to the extent to which they had acted;¹⁴ or 34, of proving that the testator meant to use general words in this or that particular sense;¹⁵ or 35, of adding to, detracting from, or

¹ Hurst *v.* Beach, 5 Madd. 351.

² Leake *v.* Randall, 1 Vin. Abr. 188, G. a. pl. 3.

³ Id. pl. 4.

⁴ Bootle *v.* Blundell, 1 Mer. 193.

⁵ Brown *v.* Selvin, Cases temp. Talbot, 240; s. c. on appeal, 3 Bro. P. C. 607.

⁶ Per Lord Thurlow, 2 Bro. C. C. 527.

⁷ Rachfield *v.* Careless, 2 P. Wms. 157.

⁸ Per Lord Hardwicke, in Goodinge *v.* Goodinge, 1 Ves. sen. 231.

⁹ Anon. 8 Vin. Abr. 188, G. a. pl. 1. ¹⁰ Whitton *v.* Russel, 1 Atk. 448.

¹¹ Lowfield *v.* Stoneham, 2 Strange, 1261.

¹² 2 Vern. 625; and see Altham's case, 8 Rep. 155.

¹³ Bret *v.* Rigden, Plow. 340; and see Doe *v.* Kett, 4 Term R. 601; Maybank *v.* Brooks, 1 Bro. C. C. 84.

¹⁴ Doyle *v.* Blake, 2 Sch. & Lefr. 240.

¹⁵ Goodinge *v.* Goodinge, 1 Ves. sen. 231.

ltering, the will;¹ or 36 (generally), of proving *intention*.²

122. To the above may be added the recent case of *Doe d. Richardson v. Watson*,³ and the still more recent cases of *Clementson v. Gandy*, *King v. Badeley*, and *Preedy v. Holtom*. In *Clementson v. Gandy*, evidence was tendered to show, that the testatrix had made her will upon a miscomputation of the amount of her property.⁴ The Master of the Rolls said,—“In cases which require it, the Court may look at external circumstances, and consequently receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parol evidence is not to be resorted to, except for the purpose of proving facts which make intelligible something

¹ *Herbert v. Reid*, 16 Ves. 481.

² Per Buller, J. in *Nourse v. Finch*, 1 Ves. jun. 358; per Sir Wm. Grant, M.R. in *Cambridge v. Rous*, 8 Ves. 22, and in *Bengough v. Walker*, 5 Ves. 514; per Lord Eldon, in *Herbert v. Reid*, 16 Ves. 485–6 and 489; *Attorney-General v. Grote*, 3 Mer. 316, *Maybank v. Brooks*, 1 Bro. C. C. 84 (*Legatee dead*); *Doe v. Kett*, 4 T. R. 601 (*Devisee dead*); Lord Lansdowne's case, 10 Mod. 98–9; *Cole v. Rawlinson*, 1 Salk. 234; *Bertie v. Lord Falkland*, 1 Salk. 231 (*Instructions for the Will*); *Lowfield v. Stoneham*, 2 Strange, 1261; *Chamberlayne v. Chamberlayne*, 2 Freem. 52; *Howers v. Moor*, 2 Vern. 98; *Vernon's case*, 4 Rep. 4; *Cheyney's case*, 5 Rep. 68; *Brett v. Rigden*, Plow. 340; *Bac. Elem. Reg.* 23; 2 *Bac. Abr.* 09; *Challoner v. Bewyer*, 2 Leon. 70; and the following treatises,—Sugd. *end. tit.* “Ambiguity;” *Phil. on Evid.*; and *Roberts on Wills. Contra*,—*Harris v. Bishop of Lincoln*, 2 P. Wms. 135; *Pendleton v. Grant*, 2 Vern. 517; s. c. 1 Eq. Abr. 230; *Dayrel v. Molesworth*, 1 Eq. Abr. 230; *Docksey v. Docksey*, 2 Eq. Abr. 415; but see s. c. 11 Vin. Abr. 153; *Masters v. Masters*, 1 P. Wms. 420 (*N.B. a Charity case*); and see per Lord Chancellor Brougham, in *Guy v. Sharp*, 1 Myl. & K. 602, *supra*, pl. 96, note [Kirk v. Eddowes, 3 Hare, 509.]

³ 4 B. & Adol. 787.

⁴ 1 Keen, 309. [The precise object of the evidence was to show that the testatrix intended to pass under a general bequest certain property in which she had only a life interest, supposing it to be her own absolutely, so as to put a legatee, who had an interest in the property, to his election.]

in the will, which without the aid of extrinsic evidence cannot be understood. Here the intention to dispose is clearly expressed by the testatrix; there is no ambiguity in the expression she has employed; and extrinsic evidence for the purpose of contradicting the intention is inadmissible." In *King v. Badeley*,¹ a testator having devised his estates in a particular way, directed, that a different disposition of them should take place, "in case certain contingent property and effects in expectancy should fall in and become vested interests to my children," etc. The children being entitled to no contingent interests at the date of the will, the Court refused to admit evidence for the purpose of showing that the testator referred to expectations from particular incidents which had afterwards been realized. The Master of the Rolls said,—“If at the making of the testator’s will, his children had been entitled to any contingent interests, evidence would have been plainly admissible to ascertain those interests, because the expression of contingency has a definite legal meaning, and *id certum est quod certum reddi potest*; and the evidence would have explained, but would not have added to the will. To admit evidence to show that the testator referred to expectations from Mr. Ewer, would not be to explain the expressions of his will, but to add to his will that which he has not expressed. The evidence offered must, therefore be rejected.” In *Preedy v. Holtom*,² the testator devised to A. the messuage in S., in which the testator resided, with the buildings to the same adjoining, and all those several closes in S. aforesaid, called C., D., and E., (with the brick-kiln erected thereon), and F., with their appurtenances, part of the farm and lands

¹ 3 Myl. & K. 417.² 4 Adol. & Ellis, 76.

hen in testator's own occupation. The will then contained a devise to B. of a second messuage, and also the testator's lands. Under this will B. claimed two cottages in S., which, when the will was made, adjoined the messuage in which the testator resided, but were not in his occupation, and were divided from the messuage by a wall built by the testator. For the purpose of showing that the cottages claimed by B. were intended to pass under the residuary clause, evidence of declarations, made by the testator when giving instructions for his will, was tendered. The Court clearly held, that evidence was admissible, only to show what the state of the testator's property was, but not for the purpose of construing the expressions of the will, and giving them a more extended meaning than the words themselves bear."

123. It may, therefore, it is conceived, notwithstanding the opinions expressed by Lord Cowper and Sir John Strange, be considered as settled, that the rule of law which excludes extrinsic evidence to prove *intention* is not subject to any such exception as their opinion appears to point at.¹

124. It will be seen, on examining the reports of the cases referred to in support of the Sixth Proposition, that, in many of them, the evidence tendered consisted of *declarations* by the testator, or of *instructions* given by him for preparing his will. Such evidence is, obviously, inapplicable to an inquiry, in which the question is, not what the *testator* meant to express, but what his *words* do express. In others, of the same class of cases the precise nature of the evidence tendered does not appear by the reports; but, from the nature of the point in dispute in those cases, it is clear that fact

¹ See observations *infra*, pl. 150 *et seq.*

alone could not, by any explanatory effect upon the words of the will, have shown that the will itself expressed the intention ascribed to the testator. The purpose, therefore, for which the evidence in those cases was tendered, must have been that of proving an intention which the will itself did not express; and the cases, in conformity with principle, are decisive, that, for such a purpose, extrinsic evidence, as a general proposition, is inadmissible.

125. The cases most strongly illustrative of the rule by which *avermment of intention* is excluded, are those in which the language of the will, although it might, in point of strict legal construction, require one interpretation, was capable, in the ordinary use of language, of the secondary interpretation which it was the object of the evidence to give it. Yet, it appears that, even in such cases, *evidence to prove intention*, as a general proposition, is inadmissible.

126. "*Void for uncertainty.*"—As the effect of the Sixth Proposition is to preclude a Court from ascribing to a testator any intention which his written will does not express, whilst the Third Proposition leaves a wide field of exposition undefined by any positive rules, it may with reason be said, that, in the application of the Third Proposition to the exposition of a will, conjectural interpretation is likely often to usurp the place of judicial exposition; and it may be asked, how, in the application of evidence of collateral facts to the exposition of wills of doubtful meaning, is exposition to be distinguished from conjectural interpretation?

127. The answer to the question in all its bearings, is by no means easy.

128. In cases in which the meaning of the words is either settled by decision, or clear upon the will

itself, and in which the facts of the case do not necessarily *exclude* the supposition that the words were used in their decided or apparent sense, the Second Proposition above stated leaves nothing to the discretion of a Court; and exposition, in the strict observance of that Proposition, is safe against the inroads of conjecture. In those cases, however, in which (the strict and primary sense of the words being excluded by the circumstances of the case) it is left to the Court to explain them in some secondary or popular sense; or in which it is doubtful whether the words express any certain meaning: the judgment and discrimination of the Court is, of necessity, brought into action, and the difficulty suggested by the question now under consideration presses with considerable force. It is impossible, with reference to such cases, to draw any precise line, by which, in the application of extrinsic evidence to the exposition of a will, exposition is to be distinguished from conjectural interpretation. The test to be applied in each particular case is this,—Do the words of the will, when all the circumstances of the case are known, express the intention which is ascribed to the testator? The Court which interprets the will must be satisfied that they do so, and no other rule can, in the abstract, be laid down.

129. If it be said, that this is raising a question rather than propounding a rule,—the answer to such an observation must be, that the test is as precise as the nature of the subject will admit. The Master of the Rolls, Lord Alvanly, in deciding on a will of doubtful construction, does not appear to have thought that a more precise test could be proposed. “As to the irresistible inference,” he says, “I do not know what is meant by that; I admit it must be such an inference as leaves no doubt upon the mind of the

person who is to decide upon it. It must be *irresistible to my mind*." And in *Attorney-General v. Grote*,¹ Lord Eldon said: "Individual belief ought not to govern the case,—it must be judicial persuasion." In the case of *Goblet v. Beechey*,² the inference that Nollekens meant *models*, by the word "mod" was irresistible to the mind of the Vice-Chancellor. His mind was *judicially persuaded* that such was the sense in which the testator used the word. The mind of the Lord Chancellor was proof against the same impressions. The case is a fair illustration of the legal meaning of an *irresistible inference*, and a *judicial persuasion*.³

[For the American law, and cases of uncertain testamentary gifts, the reader is referred to the supplementary treatise.]⁴

¹ Appendix, No. I.

² Appendix, No. II.

³ 3 Ves. 113; and see 1 Ves. & B. 466; and 1 Mer. 193, in *Bootle v. Blundell*; *Attorney-General v. Grote*, *infra*, Appendix, No. II.

⁴ Chap. ii, §§ 13, 14; chap. xvi, §§ 4, 5; chap. xxvi, § 1; see, especially, *Winder v. Smith*, 2 Jones' Law (N. C.), 327; *Den v. McMurtrie*, 3 Green, 276; *Limbrey v. Gurr*, 1 Mad. & Geld. 151; *First Parish in Sutton v. Cole*, 3 Pick. 232; *Bartlett v. King*, 12 Mass. 537; *Piercy v. Piercy*, 19 Ind. 467; *Woods v. Woods*, 2 Jones' Eq. 420; *Townsend v. Downer*, 23 Vermont, 225; *Janey v. Latone*, 4 Leigh, 327; *Trippe v. Frazier*, 4 Har. & Johns. 446; *Hammond v. Ridgeley*, 5 Har. & Johns. 245; *Rothmaler v. Myers*, 4 Desaus, 215; *Drew v. Drew*, 8 Foster, 489; *Douglas v. Blackford*, 7 Md. 8; *McDermott v. United States Insurance Company*, 3 Serg. & R. 607; *Hill v. Bowman*, 7 Leigh, 650; *Trustees v. Peaslee*, 15 (N. Hamp.) 268; *Smith v. Smith*, 4 Paige, 271; s. c. 1 Edw. Ch. 189; *Neuthway v. Ham*, Tamlyn (Eng.) 316; 1 Greenl. Ev. § 301; *Wheeler v. Smith*, 9 How. (U. S.) 55, 79; *Carter v. Balfour*, 19 Ala. 814; *Minot v. Boston Asylum*, 7 Met. 416; 2 Story Eq. Jur. § 979a.

PROPOSITION VII.

Notwithstanding the Rule of Law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning,—Courts of Law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose.

These cases may be thus defined:—where the object of a testator's bounty, or the subject of disposition (i. e. the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator.¹

130. A class of cases must now be referred to, in which—notwithstanding the preceding class of cases

¹ [The following case affords too happy an illustration of the liberal and practical spirit in which the Courts will *apply* the above Proposition, to be dismissed with a mere reference:—

In *Reynolds v. Whelan*, 16 L. J. N. S. Ch. 434, the testator, Augustine Luck, by his will, dated in 1836, made the following bequest:—"I give to William Reynolds, one of my farming men, if in my employ at the time of my decease, the sum of £100."

The testator, who was a farmer, had in his employ at the date of his will, and at the time of his death, two persons of the name of William Reynolds. One of them, the plaintiff, was a common farming servant; and the other, who was called "Old Will," performed a variety of functions about the person, house, and farm of the testator.

Soon after the testator's death, his executors, considering that Old Will was the person intended by the testator to be legatee, paid him the legacy.

A suit was now instituted by the plaintiff against the surviving

by which proof of intention appears, upon principle, to be excluded—the Courts have permitted the inten-

executor, for the payment of the legacy of £100 given to William Reynolds.

Some evidence was entered into, for the purpose of showing that the testator intended the legacy for the person called "Old Will." It appeared that Old Will had been in the service of the testator and his father forty years at the date of the will of 1836; that the testator had made a will in 1831, which was in part as follows:—"I give to Richard Ainge, one of my farming men, £100, and to William Reynolds, another of my farming men, £50;" that in 1836, before the date of his second will, he told a witness that he had given "Old Will" £50, and that he should leave him £100.

Sir J. L. Knight Bruce said:—"The question in this case is, whether William Reynolds, the plaintiff, is the person to whom a legacy is given by the will of Augustine Luck in these words, 'To William Reynolds, one of my farming men, if in my employ at the time of my decease, a sum of £100.' To this legacy the plaintiff's title would be clear and unexceptionable, but for the circumstance that another man, also called William Reynolds, was also in the service and employment of the testator at the time his will was made, and at the time of his death. By this other William Reynolds the money was claimed and, whether rightly or erroneously, paid to him by the executors,—the truth being that it certainly would have been correct to consider him as the legatee if the plaintiff had never been in the testator's service, assuming, as I do, that there was not a third William Reynolds.

"The only question of any difficulty is, I suppose, whether, at the time of the will being made, the William Reynolds who is not the plaintiff was one of the testator's 'farming men,' or a person to whom, without impropriety or inaccuracy, the description of one of his farming men was then actually applicable? If this question ought to be answered in the negative, the plaintiff is, I think, entitled to a decree; if it ought to be answered in the affirmative, I consider the evidence goes to show that the legacy was intended for the other William Reynolds and not for the plaintiff.

"The testator, a Northamptonshire gentleman, who was, I think, a bachelor or widower without family, seems to have been one of those persons of unostentatious habits who prefer the realities to the fancies of life. He farmed 200 or 300 acres of land, or more, wholly or partly his own. He employed upon his farm eight or nine farming men, if not more, of whom Ainge, mentioned in his will as one of his farming men, was his overseer, or a kind of bailiff, under a less high name. Mr. Luck's domestic establishment seems to have been frugal and rustic. He had only two female servants; one of them a kind of housekeeper. He seems not to

tion of a testator to be made the subject of inquiry by extrinsic evidence alone.

have had a man or a boy in his service except mere farm laborers, subject to the question whether that description belongs to the person who has received the legacy, or Ainge? This William Reynolds, who has received the legacy, was the only male person, besides the testator, who lived in the house. He seems to have been one of that very useful order of men, well known to some of our old dramatists, who according to the custom which, perhaps more frequently formerly than at present, prevailed as well here as everywhere else, in farming as in other households, turned their hands to anything; which class however, especially since the practice of the division of labor, is fast disappearing. He was, in some sense, a household servant certainly; I do not collect that he waited at table, but he whetted the knives, and cleaned the boots and shoes. I do not say or infer that he attended the dressing-room, if any, of Mr. Luck.

"Whether, in respect of him, the testator was a direct contributor to the revenue, or made himself so, does not appear; but I must believe (always speaking from that portion of the information concerning his manner of life which the materials before me afford), that if he had been taxed with—I do not say taxed for—having a coachman, groom, gardener, footman, valet, or butler, he would have denied the charge; and yet that it would have been incorrect or improper for him to have described Old Will as—or that he was not in the habit of calling him, or that he might not honestly have called him—his groom, his gardener, his footmen, his butler, his coachman, or his valet, I am far from sure; since in the exercise of the functions belonging to a majority at least, if not every one of such various departments of service with their very diversified names, this manifold serving man seems to have passed his time, so far as he was not employed in other ministrations, which in a minor degree were at least perfectly ample; for in the morning he milked the cows; he also milked the cows in the evening; he attended to them and the calves; he waited on the pigs; and, in addition to all this, lent a hand occasionally in the rick-yard, or otherwise upon the farm. If then he was coachman, groom, and gardener, if he was valet, footman, and butler, why may he not also have been a farming man? To what other part of that description can the care of cows, calves, or pigs, be treated as belonging,—to say nothing of the rick-yard, or occasional work otherwise on the farm-yard? He boarded, and generally lodged, it is true, in the testator's house; but that does not prove him not to be a 'farming man.' His wages were weekly wages, and, most certainly during a considerable part of his life, he was a farm laborer or a farm servant.

"Upon the whole of the evidence legitimately capable of being regarded upon the question, I am of opinion that the William Reynolds who is not the plaintiff was a person whom, at the time of the will being

131. In *Selwood v. Mildmay*,¹ the testator, by his will, dated the 26th of January, 1796, gave to his wife, E. M., the interest and proceeds of £1,250, "part of my stock in the £4 per cent. annuities of the Bank of England, for and during the term of her natural life, together with such dividends as shall be due upon the said £1,250 at the time of my decease;" and, after the decease of his wife, he gave the said stock to several of his relatives in certain shares and proportions, always calling it his "£4 per cent. stock;" and he disposed of the residue of his estate. The testator had not, at the time of making his will, or at any subsequent time, any £4 per cent. stock. At the time of his death, his personal estate consisted only of some Long Annuities, household furniture, and leaseholds specially bequeathed. In February, 1792, the testator had some £4 per cent. stock, which he sold out in that month, and with the produce of which he purchased, in the same month, certain Long Annuities. The attorney who drew the will deposed, that when the testator gave him instructions for preparing his will, he gave him, as part of his instructions, a former will, by which he had given divers legacies, payable out of his stock in the £4 per cents.; and that, the testator not having informed the deponent that he had sold out the stock, and invested the proceeds in the purchase of Long Annuities, he, the deponent, made the above mistake in the will. The

made, it was not improper or incorrect to designate or describe as one of the testator's 'farming men.' He was in my opinion a farming man, and something, or rather in some things, more; but still a farming man. I dismiss the bill, therefore, although without costs, for I do not consider that the case is altogether free from difficulty."]

¹ 3 Ves. jun. 306. See the observations upon this case, in *Miller v. Travers*, *infra*, pl. 181, 189; in *Hiscocks v. Hiscocks*, *infra*, pl. 183, [and in *Lindgren v. Lindgren*, *infra*, pl. 193. note.]

Court was of opinion, upon the evidence above stated, that the mistake should be rectified, and decreed accordingly.

132. This case, although the evidence consisted of facts only, unconnected with the question of intention, cannot, it is conceived, be satisfactorily explained upon the principle of the cases of inaccurate description before referred to.¹ The evidence, in this case, did not establish any correspondence or agreement whatever between the description in the will and that of the subject intended. The testator had not (even imperfectly) described the thing he meant to have described; on the contrary, the evidence clearly proved, that he had by mistake described one thing where he meant another. The case would, in substance, have been the same, if the proceeds of the sale of the testator's £4 per cent. stock had been traced into an investment in land, instead of Long Annuities; in which case, it seems, his intention would have been disappointed.²

133. In *Doe d. Le Chevalier v. Huthwaite*,³ the testator, after several previous limitations (which had expired at the time of the action brought), devised his estate to "Stokeham Huthwaite, *second* son of John Huthwaite, for life, with remainder to his first and other sons and daughters, in strict settlement; and, in default of such issue, to 'John Huthwaite, *third* son of the above-mentioned John Huthwaite, for life;'" with remainder to his first and other sons and daughters, in strict settlement. In fact, Stokeham Huthwaite was the third son of John Huthwaite, and John Huthwaite (the devisee) was his second son. The Court was of opinion,

¹ *Supra*, pl. 65, 66, 67.

² 3 Ves. jun. 310; *Hiscocks v. Hiscocks*, *infra*, pl. 183.

³ 3 B. & Ald. 632; [s. c. 8 Taunt. 306.] See the observations upon the case of *Hiscocks v. Hiscocks*, *infra*, pl. 183 *et seq.*

that evidence of the state of the testator's family and other circumstances was admissible; and that, upon such evidence being given, the jury might find whether he had made a mistake in the name of the devisee or not.¹ It would be impossible, in this case, to adopt any construction which the words of the will would not, in some degree, contradict. It is not like the cases referred to in a former page,² to which the rule *falsa demonstratio non nocet* was applied. The characteristic of those cases is this,—that the description, so far as it is false, applies to no subject, and so far as it is true, it applies to one subject only. The Court in those cases rejects no words but those which are shown to have no application to any subject. In *Doe d. Le Chevalier v. Huthwaite*, the entire description in each case was inapplicable to either of the sons, but different parts of each entire description were applicable to each claimant.³ Neither claimant answered the words in the will. It could, therefore, only be by rejecting from the description of each devisee a part which was applicable to the other of them; or, in other words, it could only be by inference from circumstances, not supported by or reconcilable with the language of the will, that the testator's intention could be effectuated,

134. The cases of *Door v. Geary*,⁴ *Dobson v. Waterman*,⁵ *Penticost v. Ley*,⁶ and *Evans v. Tripp*,⁷ may also be referred to in this place, as cases respecting which it is (at least) doubtful, whether they can be explained upon strict principles of exposition.

¹ It does not appear that any declarations by the testator were tendered in this case. See *infra*, pl. 183, *Hiscocks v. Hiscocks*. [*Bradwin v. Harpur*, Amb. 373.]

² *Supra*, pl. 67.

³ See 6 Term R. 676, per Lord Kenyon, C. J.

⁴ 1 Ves. sen. 255.

⁵ 2 Jac. & W. 207.

⁶ 3 Ves. jun. 308, n.

⁷ 6 Madd. 91.

135. It may, however, be said of the cases of *Selwood v. Mildmay*, *Doe d. Le Chevalier v. Huthwaite*, and the other cases just referred to, that, inasmuch as the evidence by which the intention was ascertained consisted merely of facts collateral to the question of intention, no qualification of the rule, by which *direct proof of intention* is excluded, is, in those cases, judicially recognized. This must be admitted. The following cases, however, are not open to the same explanation, but recognize and establish the proposition—that *intention*, independently of the language of the will, has, in some cases, been the direct and immediate subject of proof.

136. In Cheyney's case,¹ A.D. 1591, it is said, if a man has two sons, both baptized by the name of John, and conceiving that the elder (who has been long absent) is dead, devises his land by his will in writing to his son John generally, and in truth the elder is living; in this case the younger son may produce witnesses *to prove his father's intent*; and in the same case it is further said,—“And no inconvenience can arise if averment in such case be taken, in case of a devise by will; for he who sees such will, whereby land is devised to his son John, cannot be deceived by any secret invisible averment; for when he sees the devise to his son John, he ought, at his peril, to inquire which John the testator intended, *which may easily be known by him who wrote the will, and others who were privy to his intent*; and if no direct proof can be made of his intent, then the devise is void for the uncertainty.”

137. In *Crounden v. Clarke*,² A.D. 1613, it is said,—if I devise land to my son John, having two of that name, averment *who was meant* shall make this certain.

5 Rep. 68. [Bate v. Amherst, Sir T. Raymond, 82.]

² Hobart, 32.

138. In *Jones v. Newman*,¹ a testatrix devised the premises in question to John Cluer, of Calcot, under whom the defendant claimed. The plaintiff gave evidence that, at the time of making the will, there were two John Cleurs, father and son; and, therefore, that the devise was to the father, who died before the testatrix, and so the devise lapsed. Upon this, the defendant offered to prove, by parol evidence, that the testatrix *intended* to leave it to John Cluer, the son; but the Judge would not suffer it. Upon a motion for a new trial, it was held, *per totam curiam*, that the Judge was mistaken.

139. In *Hampshire v. Pierce*, before stated,² it was proved *by declarations* of the testatrix, that by "the four children," she meant the four children by a second marriage. The Master of the Rolls was clear that this was proper evidence, and acted upon it accordingly.

140. In *Thomas v. Thomas*,³ the devise was as follows:—*Item*, I devise to my grand-daughter, Mary Thomas, of Llechlloyd, in Merthyr parish, the reversion, etc.* The testator had a grand-daughter of the name of Elinor Evans, who lived at Llechlloyd, in Merthyr parish, and a great-grand-daughter, Mary Thomas, who lived at Green, in the parish of Llangam, some miles from Merthyr parish. At the trial, the plaintiff's counsel proposed giving parol evidence to show a mistake in the name of the devisee, namely, that when the will was read over to the devisor, he said there was a mistake in the name of the devisee, but that there was no occasion to alter it, as the place

¹ 1 Wm. Bl. 60.

² *Supra*, pl. 31, and See *Hiscocks v. Hiscocks*, *infra*, pl. 183.

³ 6 Term R. 671. See the observations upon this case, in *Hiscocks v. Hiscocks*, *infra*, pl. 183; [and per Lord Brougham, in *Lord Camoys v. Blundell*, 1 Ho. Lo. Cas. 794.]

of abode and the parish where the devisee lived were sufficient to ascertain the object of his bounty. The Judge admitted the evidence, but the Jury did not give credit to it. Upon a motion for a new trial, Lord Kenyon, C. J., and Lawrence, J., both expressly said, that, for the purpose of showing whom the testator meant by the ambiguous description in the will, *declarations* by him at the time of making his will were clearly admissible in evidence.

141. In *Price v. Page*,¹ Thomas Bell, by his will, after some legacies, gave to — Price, the son of — Price, the sum of £100. The plaintiff was the only person who claimed the legacy. Evidence of the relation in which the plaintiff stood to the testator was given; and it was also proved, that the testator *said* he *had* provided, or would provide for the plaintiff, and that he had left him something by his will. This latter evidence was relied upon in the judgment.

142. In *Hodgson v. Hodgson*,² R. H. devised to the defendant H. several closes, paying £100, he (the testator) owed to J. S., and £100 he owed by bond to one Shaw. It fell out, that the money due upon the bond was not due to Shaw, but was the money of Alice Beck, then the wife of one Fitch. The devisee of the land refused to pay the £100. The plaintiff examined Harvey, who drew the will, who deposed that the testator declared he meant the £100 due to the person who married Mr. Beck, of Lincoln; and another witness deposed, that he meant the debt for which C. was bound as surety. Decreed for the plaintiff, first at the Rolls, and afterwards by the Lord Chancellor, who declared he saw no hurt in admitting collateral proof to make certain the *person* or the *thing* described.

¹ 4 Ves. jun. 680. [*Phillips v. Barker*, 1 Sm. & Gif. 583.] ² 2 Vern. 593.

143. In *Beaumont v. Fell*,¹ the testator gave a legacy of £500 to Catherine Earnley. No person of that name, but one Gertrude Yardley claimed the legacy. By the proofs it appeared, that the testator's voice, when he made his will, was very low, and hardly intelligible; that the testator usually called this legatee of £500., Gatty, which the scrivener, who took instructions for drawing the will, might easily mistake for Katy; and that the said scrivener, not well understanding who the legatee of £500 was, or what was her name, the testator directed him to J. S. and his wife, to inform him; who afterwards declared that Gertrude Yardley was the person intended. It was moreover proved, that the testator, in his lifetime, had *declared* that he would do well for her by his will. The Court said, that, in that case, the name only was mistaken, and that it was very material that no such person as Catharine Earnley claimed the legacy, which together with the proofs of the testator having a very low voice, and of his having usually called the plaintiff Gatty, instead of Gertrude, and often declared he would do well for her, was sufficient to entitle the plaintiff to the legacy. This case has frequently been referred to with approbation.²

144. In *Doe d. Westlake v. Westlake*,³ *declarations* of the testator were admitted, for the purpose of proving which of several persons having the same name was intended. It was afterwards decided, that the evidence was inadmissible; but the express ground of the latter decision was, that the will itself ascertained which person was intended.⁴

¹ 2 P. Wms. 140. See *Hiscocks v. Hiscocks*, *infra*, pl. 183.

² 6 Term R. 676; 7 Term R. 148; 3 Taunt. 156; MS. *Case*, pl. 146, *infra*; *Miller v. Travers*, before the Vice-Chancellor, *infra*, pl. 147.

³ 4 B. & A. 57; s. c. *supra*, pl. 35.

⁴ *Supra*, Proposition II.

145. In *Still v. Hoste*,¹ a testatrix, by her will, amongst other legacies, bequeathed the sum of £100 "unto Sophia Still, the daughter of Peter Still, of Russell Square." Peter Still had only two daughters, named respectively Selina and Mary Ann. The attorney who made the will, and another, proved that Selina was the person meant. The Vice-Chancellor: "There can be little doubt that Selina Still is the person entitled to the legacy, but the other daughter being an infant, let it be referred to the Master to inquire who was the legatee *intended* by the description in the will of the testatrix."

146. In a case (with a copy of which, and of the opinions upon it, the writer of this work has been favored), a testator devised his estate in the county of A., to B. and her heirs. The testator had not, at the time of making his will, any estate in the county of A. He had estates in four other counties, C., D., E., and F. The estate intended for B. was in the county of E. The evidence by which it was proposed to prove the intention, consisted of the instructions given for preparing the will; the declarations of the testator made to his steward; and a letter he wrote to B. about the time of making his will. The opinions of several gentlemen of the first professional eminence, two of whom now fill high judicial stations in this country, were taken upon this case, and all agreed in thinking the evidence admissible.² The case of *Beaumont v. Fell* was referred to by one of them as a case in point.

147. The Vice-Chancellor, on the 8th of July, 1830, decided a case, *Miller v. Travers*, which went the full

¹ 6 Madd. 192.

² See further, *Altham's case*, 8 Rep. 155; *Harding v. Suffolk*, 1 Ch. Rep. 74; 3 Wills. 276; 2 Atk. 239, 240, 373; 1 Bro. C. C. 341; 19 Ves. 654; *Evans v. Tripp*, 6 Madd. 91. See, also, *note*, pl. 193, *infra*.

length of the MS. case which has been stated, and in its circumstances was scarcely distinguishable from it.¹ In that case, the testator devised all his freehold and real estates whatsoever, situate 'in the county of Limerick' and in the city of Limerick, to trustees therein named and their heirs. At the time of making his will, the testator had no real estate in the county of Limerick, but he had a small real estate in the city of Limerick, and considerable real estates in the county of Clare. The principal question in the cause was, whether evidence was admissible to prove that the testator *intended* his estates in the county of Clare to pass by the devise, and that the word 'Limerick' was inserted by mistake instead of 'Clare.' The Vice-Chancellor, upon a review of the authorities, was of opinion that such evidence was admissible, and directed an issue upon that principle.

148. The cases above cited exhibit, it is believed, a correct statement of the authorities for admitting evidence *to prove intention*, at the time the first edition of this word was published (January, 1831).

149. Upon this state of the authorities the observations contained between the *line* in the next page and the *line* in page 136 (with the exception of a few explanatory observations, which have since been added) were made. The cases of *Miller v. Travers*, *Gord v. Need*, and *Hiscocks v. Hiscocks* have since been decided, and have settled many of the points to which those observations were applied. The observations, however, are retained in the present edition from an apprehension that some points may possibly arise which may not be considered as completely settled by these important cases.

¹ Since reported, 8 Bing. 244.

150. From these cases,¹ it appears, that evidence of intention has, in some instances, been permitted, and a class of exceptions to the general rule, by which direct proof of intention is excluded, is thereby established.

151. The principle (if any) upon which the excepted cases, taking them collectively, are founded, is by no means obvious.

152. As to those cases in which the description in the will is applicable indifferently to, and sufficiently describes, more than one subject, the principle upon which they proceed may, perhaps, be explained; for in such cases, although the words do not *ascertain* the subject intended, they do *describe* it. The person held entitled in these cases has answered the description in the will. The effect of the evidence has only been to confine the language within one of its natural meanings. The Court has merely rejected;² and the intention which it has ascribed to the testator (sufficiently expressed) remains *in* the will. "An averment to take away *surplusage* is good, but not to increase that which is defective in the will of the testator."³ Or, perhaps, the more simple explanation is, that the evidence only determines what subject *was known to the testator* by the name or other description he used.⁴

¹ *I. e.* Cases prior to *Miller v. Travers*, *Gord v. Need*, and *Hiscocks v. Hiscocks*.

² Consider but *qu. Anon.* 8 Vin. 188, (G. a.) *pl.* 1; *Trimleston v. Lloyd*, 1 Bligh, N. S. 449, 451, 476; *Hippesley v. Homer*, Turn. & Russ. 48, n.; *Powell v. Mouchett*, 6 Madd. 216.

³ [Per Anderson, C. J., *Godb.* 131; and see] 6 Ves. 397; 8 Rep. 155; 8 Bing. 258.

⁴ In *Richardson v. Watson*, 4 B. & Adol. 800, Parke, J., referring to cases of this description, says,—“Such evidence is admissible to show, not what the testator intended, but *what he understood to be signified by the words he used in the will.*”

153. The cases, however, in which the descriptive language of the will is *inapplicable with certainty to any subject*, cannot be explained in the same way; nor is it easy to understand how those cases are to be reconciled with the Statute of Frauds. How can it be said, that the will is in writing, so far as it respects the person or thing intended, when it is admitted that the will must be inoperative unless the *intention* of the testator in these respects be proved aliundè? And how can a statute, which makes a writing indispensable, be satisfied, if the thing which is the subject of disposition, or the person who claims the benefit of it, is not described in that writing with certainty sufficient to enable a Court, by the description contained in the writing, to determine their identity? In the case of *Beaumont v. Fell*, before referred to, the Master of the Rolls, although he admitted the parol evidence, said,—“If this had been a grant, nay, had it been a *devise* of land, it had been void, by reason of the mistake both of the Christian and surname.” But where is the distinction between a grant and a *dévisé* of land for the purpose under consideration?

154. It has, however, with reference to this point, been urged,¹ that the practice of admitting evidence to prove intention in the excepted cases had obtained at common law before the existence of the statute, and that the practice was properly continued after the statute; for that it was not the intention of the framers of the statute to alter or abridge any legitimate or established modes of expounding a written instrument, but merely to substitute a written for a nuncupative will; that the statute made a writing indispensable in certain cases, in which a writing was previously un-

¹ This is the passage in the former edition referred to, *supra*, *pl.* 3.

necessary, but left untouched the means of expounding the writing which it required; and that Courts of law, therefore, must, notwithstanding the statute, be at liberty still to avail themselves of the aid of extrinsic evidence, to the full extent to which authority had, before the statute, established its admissibility.

155. This reasoning, however (regard being had to the rules of law independently of the statute), is not conclusive. The statute requires that the will should be in writing, and it cannot be seriously made a question whether this requisition is strictly complied with, in cases in which it is admitted that the will must be disappointed unless the *person* or *thing* intended, that is, in fact, the will itself, as far as the person or thing intended is concerned, be ascertained by means wholly independent of the writing which is called the will. The rule which existed at common law before the statute, existed only as a rule of convenience, and might be relaxed or straitened as much and as often as convenience, the principle upon which it was founded, made it necessary or expedient to do so. But the statute, by positive enactment, has introduced an arbitrary and absolute rule, independent of all considerations of convenience; and statute law is, necessarily, of a less flexible and accommodating nature¹ than the rules of the common law.

156. Another observation, in answer to this last-mentioned theory, remains. It is true that the practice of admitting extrinsic evidence *to prove intention* had obtained at common law before the statute, except in the special case of the description of the *person* or *thing* being applicable indifferently to more than one

¹ Norton v. Simmes, Hobart, 14; Newman v. Newman, 4 M. & Sel. 66; Goss v. Lord Nugent, 5 B. & Adol. 58.

subject. Do the earlier authorities, when critically examined, sanction the admissibility of evidence *to prove intention* where the person or thing said to be intended does not answer the description in the will? The earlier cases do not, it is conceived, warrant any such general conclusion, and, with respect to the text writers, their statements all resolve themselves into the *words* of the maxim, which has been reserved for separate consideration,¹ and which, properly explained,² appears to be limited to the Proposition (the Seventh) now under consideration.

157. It might, indeed, be argued that the admission of extrinsic evidence *to prove intention*, in cases in which the description of the person or thing was wholly inapplicable or inapplicable with certainty to any subject, and the admission of similar evidence, where the description applied indifferently to more than one subject, differs in degree but not in principle,—for that some person or thing must have been intended in the former case; and that, if all but one subject be excluded by means of extrinsic evidence, the person or thing intended by the testator will alone remain,—so that the only difference between the two cases is, that the number of subjects to be rejected, or out of which a selection is to be made, is greater in the one case than the other. In the spirit of this argument, a learned writer has said, “The names of persons appointed to take under wills have been set right by parol evidence, where both the Christian and surname have been mistaken; nor does the statute appear to be violated in this instance; for, in such case, no words are supplied or substituted, but the mistaken appellation in the instrument is applied to the person really intended by

¹ *Supra*, pl. 8.

² *Infra*, pl. 209.

it; and the names of persons having no intrinsic meaning, the will is rectified without any addition to the sense.”¹

158. The whole of this reasoning, however, is fallacious. If the statute only required that a nuncupative will should not be set up in opposition to a written will, the reason might be sufficient; but, if the just exposition of the statute be, that the writing which it requires shall of itself *express* the intention of the testator, it is difficult to understand how the statute can be satisfied by a writing merely, if the description it contains have nothing in common with that of the person intended to take under it, or not enough to determine his identity. To define that which is indefinite, is to make a material addition to the will. Once admit that the *person* or *thing* intended by the testator need not be adequately described in the will, and it is impossible to stop short of the conclusion that a mere mark will in every case supply the place of a proper description. The same observations apply, independently of the statute.

159. Other solutions of the difficulty have been suggested. Thus, it has been said, that extrinsic evidence is admissible in the excepted cases, because the ambiguity, being raised by evidence, may fairly be explained by the same means.² If by this were meant only, that where, upon a partial development of circumstances, the intention appeared to be uncertain, a more ample development of circumstances was allowable, the reason would be quite satisfactory; for the

¹ Roberts on Frauds, 16, 17.

² See 1 W. Bla. 60; 7 T. R. 148; 1 Bro. C. C. 350; Sug. Ven. p. 137, 6th edit. [ch. iii. s. 10, pl. 2, 11th edit.]; 1 Phil. on Ev. p. 531, 7th edit. [vol. II, p. 387, 10th edit.]; 2 Roberts on Wills, p. 13. [See also 1 Roper on Legacies, 390, 4th edit.]

whole process would then fall within the ascertained limits of exposition. But, applying it to the actual state of the authorities, a reasonable hesitation may be felt in admitting its sufficiency. It overlooks the essential difference between the nature and effect of the evidence which raises the ambiguity, and that by which it is removed. The former is confined to a development of facts with reference to which the will was written, and to which the language of the will expressly or tacitly refers. If the words of the will are applicable to *any* subject, the Court is inflexible in applying them accordingly. If inapplicable to *any* subject, the Court declares that the will expresses no certain intention. It is not until this declaration is explicitly made, that the question of admitting evidence of intention is ever entertained?¹ There is a wide difference, then, between the evidence which is simply explanatory of the proper meaning of the words, and that which, admitting that no certain intention is expressed in the will, is resorted to only for the purpose of proving what it was the testator *intended* to have expressed.²

160. Again, by what principle is it that the precise limits are determined, within which evidence of intention has been admitted?

161. It has been shown, that evidence will not be admitted to fill up a total blank in a will.³ Now, the omission of a name in a will may have arisen from accident or mistake on the part only of the person who prepared the will, just as much as a total misdescription or an insufficient description of the subject intended. The testator himself may have given full instructions in the former case, as well as in the latter. If the fact

¹ Proposition II, *supra*, pl. 24, [and see per Sir G. Turner, L. J., in *Horwood v. Griffith*, 4 De G. M. & G. 709, *supra*, pl. 45, *note*.]

² See 8 Bing. 247.

³ *Supra*, pl. 121.

were so, and if an entirely new description of the person or thing intended by a testator may be substituted for one inserted by mistake, or for one which is insufficient and uncertain, why (technical rules apart) should not a description omitted by mistake be supplied by parol evidence also?¹

162. It is said, in a work of great reputation,² that evidence is inadmissible to fill up a total blank, because, in that case, it is uncertain, *upon the face of the will*, whether the testator had selected the subject to which his words were intended to apply, or not. If, in fact, the testator had not made the selection, the reason would be unanswerable, for then there would be no will to execute. If the testator had made the selection, and had given full instructions to the person who prepared his will, and if the omission was really accidental, the reason can scarcely be deemed satisfactory. To fill up a blank in a will by inserting a name which the testator had really directed to be placed there, is not, in substance, more than substituting a new description, or perfecting one which is useless as it stands.³ The legatee is no more *in* the will in the latter case than in the former. It would be thought strange advice to be given to professional gentlemen, that if, in preparing a will, they should forget the name of a legatee, they should put in *any* name, rather than leave a blank for the right one. But would not the cases justify such advice? The mere circumstance that the mistake in the one case is *patent*, and in the other *latent*, will scarcely satisfy the inquirer who looks beyond the letter of a technical rule; and, it is hoped that the professional inquirer will, upon reflection, be satisfied that the tech-

¹ See 8 Bing. 250, 254.

² 1 Phil. on Ev. p. 539, 7th ed.

³ See *infra*, p. l. 161.

nical rule referred to does not support the distinction in question.¹

163. The same reason, however, admitting its sufficiency to explain the case of a blank, will not explain the unqualified rejection of Mary Holt's evidence in such a case as *Goblet v. Beechey*.² The testator, in that case, must, upon the face of his will, have intended something; he must have had some particular subject in his mind when he made use of the word upon which the question in that case arose; the only question was, what he meant? Now, either a certain description of the subject of the testator's intention is, or it is not, of the essence of a bequest. If it is so, how are the cases already referred to to be explained? If it is not so, why should not a proper description of the person or the thing intended be, in any case, supplied by averment of intention, provided only there is enough upon the face of the will to show the testator meant some particular person or thing, and the only question is,—Who or what he meant? It may be said, that, in *Goblet v. Beechey*, the *substance* of the thing intended was not described; and *Selwood v. Mildmay* may be cited to show that relief against mistake is confined to cases in which the *denomination* only has been mistaken. But, is this distinction satisfactory? If, in *Selwood v. Mildmay*,³ the proceeds of the sale of the testator's £4 per cent. Bank Annuities had been traced into an investment in land instead of Long Annuities, the real mistake would have been just as manifest, and the in-

¹ *Infra*, pl. 209, 210.

² Appendix, No. 1. The rejection of the evidence of Mary Holt in the *first instance* was unquestionably right; for, until the facts of the case were fully developed, it was impossible for the Court to determine whether the words did or did not sufficiently express the testator's intention.

³ *Supra*, pl. 131. See also *Evans v. Tripp*, *ubi supra*, pl. 134.

tention as certain, as in the case which actually occurred; yet, it seems, the Court could not in that case have prevented an intestacy.¹

164. It is in admitting evidence of intention in any case that the strong act of the Courts is done. Where it is once established, that mistakes in a will may be rectified by evidence of intention, the principle upon which (independently of any particular circumstances of a case) the *denomination*, but not the *substance*, of the thing intended, is permitted to be supplied by extrinsic proof, requires explanation.

165. Again, suppose a testator to declare in his will that he left to A. the estate he had promised (in conversation) to leave to him. If it may be assumed that such a will as this (the conscience of the heir-at-law not being affected²) would not satisfy the Statute of Frauds; and that A. could not, either at law or in equity, successfully claim the estate against the heir-at-law of the testator, upon the evidence of a witness who heard the promise,³ an additional difficulty will suggest itself;—

¹ 3 Ves. 310; and see *infra*, pl. 189.

² *Oldham v. Litchford*, 2 Freem. 284; *Devenish v. Baines*, Prec. in Cha. 3; *Muckelston v. Brown*, 6 Ves. 52; *Strickland v. Aldridge*, 9 Ves. 516.

³ See *Molineux v. Molineux*, Cro. Jac. 144. But see *Beaumont v. Fell*, *supra*, pl. 143. *Qu.* What description by *reference* will satisfy the Statute of Frauds? A description by reference to a *writing* will, it is conceived, be sufficient (*Molineux v. Molineux*, *ubi supra*), although *parol* evidence be necessary to identify the writing referred to. (*Saunderson v. Jackson*, 2 Bos. & Pul. 238; *Hodges v. Horsfall*, 1 Russ. & M. 116). But, will a description by reference to *words spoken* be sufficient? (*Molineux v. Molineux*, *ubi supra*.) [See upon this point, 1 Jarm. Wills. 2nd ed. pp. 74, *et seq.*, and the cases there cited; and the remarks in 4 Jur. N.S. part. 2, p. 100. (February 27th, 1858.)]

Qu. If the evidence was strictly admissible under the particular circumstances of *Hodges v. Horsfall*? The first question would be, whether the word *plan*, in that case, meant a *document* or a *verbal plan*? Admitting that it meant a document, a second question would be, whether evidence could be given as to which of the several plans laid before them the

for, if in that case the testator had affected only to describe the estate and person intended, although he had done so in terms wholly inapplicable to either, it might be successfully contended, upon the authority of the cases stated above, that evidence would be admissible to support the devise, though the witness should only state what he heard the testator say, or what the testator told him.

166. It has, indeed, been suggested to the writer by an intelligent and learned friend, that the case of *Beaumont v. Fell*,¹ does not authorize the conclusion which has just been stated; for that, in *Beaumont v. Fell*, there was some resemblance between *Gatty* (by which name the testator used to call the legatee) and *Katy* (which the scrivener who drew the will might have

parties had *agreed to select*? This was a term in the entire agreement which the writing in no way ascertained, and the process does not resemble that of applying similar evidence to show which of two persons or estates *was known* to a testator by a given name. (See *Smart v. Prujcan*, 6 Ves, 565, and extract from that case, *infra*, pl. 192, note; *Brodie v. St. Paul*, 1 Ves. jun. 326; 9 Ves. 250; *Boydell v. Drummond*, 11 East, 141; *Barlow v. Rhodes*, 1 Crompt. & Meeson, 439. See also *Dillon v. Harris*, 3 Bligh, N. S. 321.) In the case of *Shortrede v. Cheek*, 1 Adol. & Ellis, 57, a question arose upon the sufficiency of a guarantee, which was in the following words: "You will be so good as to withdraw the *promissory note*; and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole £45." It was suggested that the note was not sufficiently described; but the Court decided otherwise, on the ground that there was *no other note* to which the agreement could apply. Little-*dale, J.*, said, "It is true, the letter leaves it uncertain what the note was, and whether it was a note of the father or of the son; and if it had appeared that there were two notes, one given by each, I do not think parol evidence could have been received to show what was meant. So, if there had been two notes in question for the same sum, but of different dates." *Park, J.*, said, "If it had appeared in proof that there were two notes to which the promise might have applied, there might have been a difficulty as to explaining this by parol testimony." The above observations of the judges are in accordance with the author's criticisms on the case of *Hodges v. Horsfall*, with reference to the *plan* mentioned in that case.

¹ *Supra*, pl. 143.

mistaken for *Gatty*,—see the case); and, consequently, that that case cannot be relied on as an authority for the broad proposition, that a description *wholly dissimilar* from that of the object intended can be corrected by evidence of intention. The point is noticed as deserving attention; but the writer can see no difference, in principle, between a description which is wholly inapplicable, and one which is so insufficient as to be useless, until it is proved as an independent fact, for whom or for what the description was intended. The suggestion, moreover, does not meet the case of *Selwood v. Mildmay*.¹ nor the MS. case of several estates in different counties, *supra*, pl. 146; nor that of *Miller v. Travers*, as decided by the Vice-Chancellor, *supra*, pl. 147. The common maxim, which distinguishes *latent* and *patent* ambiguities,² has, moreover, always been considered by text writers as sanctioning the case of *Beaumont v. Fell*, so understood; and the Vice-Chancellor must have so understood the law when he decided the case of *Miller v. Travers*.

167. Again, if where the description of the subject intended is applicable indifferently to more subjects than one, evidence of intention is admissible to determine its application, why should not such evidence (according to the opinion expressed by Lord Cowper,³) be admissible in all cases to determine the application of words which are capable of various interpretations?

168. THE DECISIONS, then, in the excepted cases, must, it is conceived, be considered to a great extent as arbitrary, and not to be explained upon any determinate principle. They appear to be decisions in

¹ *Supra*, pl. 131.

² *Infra*, pl. 196.

³ *Supra*, pl. 109.

which a general principle has been sacrificed to meet the hardship of particular cases.

169. The precise conclusions to be drawn from them are by no means obvious.

170. It is observable that they are confined to cases in which the object of the testator's bounty, or the subject of disposition, was the only point to be determined by the evidence.

171. The authorities do not, however, embrace every case in which the intention of the testator is ambiguous as to the object or the subject intended.¹

172. With respect to the cases in which the ambiguity related to the object of the testator's bounty, it is observable, that they were cases in which the will expressed a determinate intention in favor of some particular person; but the particular person intended was uncertain; either because the name or description of such person was applicable indifferently to more persons than one; or, because it was inapplicable with certainty² to any person.

173. The same reason which prevailed for admitting evidence of intention to correct an ambiguity as to the person, would, it is conceived, apply to an ambiguity as to the subject of disposition, where the ambiguity arose from a similar cause, provided the *substance* or *nature* of the subject intended were defined by the language of the will.³

174. Such was the state of the authorities respecting the admissibility of extrinsic evidence to prove *intention*, and such the difficulties which appeared to oppose themselves to its admission, prior to the decision of the appeal in *Miller v. Travers*, *infra*.

¹ *Supra*, Proposition VI.

² See pl. 133, 146.

³ See MS. case, pl. 146; 3 Ves. jun. 310; *Miller v. Travers*, pl. 147.

175. The description of cases in which such evidence had been held admissible prior to this decision, were two: 1, Those in which the description in the will applied indifferently to more than one subject; and, 2, those in which it was inapplicable with certainty to any subject.

176. Since the decision in *Miller v. Travers*, the cases of *Gord v. Needs*, and *Hiscocks v. Hiscocks* have been decided.

177. The question raised in *Miller v. Travers* was, whether evidence to prove *intention*, as distinguished from *explanatory evidence*,¹ was admissible to show that estates in the county of Clare were intended by the description "Estates in the county of Limerick?" in other words,—whether a description wholly inapplicable in itself to the subject said to be intended, could be applied to that subject by force only of evidence of the testator's intention? And it was held that the evidence was inadmissible.

178. The question in *Gord v. Needs*,² was whether evidence was admissible, to show which of two claimants, *each answering the description in the will*, was intended by the testator? And it was held that the evidence was admissible.

179. In *Hiscocks v. Hiscocks*,³ the question raised was, whether similar evidence was admissible for the purpose of enabling the Court to apply to each of two claimants, respectively, one of two descriptions in a will, neither of which was applicable with legal certainty to either claimant? and it was held that the evidence was inadmissible.

180. In the state of the authorities which has been shown, the case of *Miller v. Travers* came before the

¹ *Supra*, pl. 10.

² *Infra*, pl. 182.

³ *Infra*, pl. 183.

Lord Chancellor, on appeal from the decision of the Vice-Chancellor, already stated.¹ His Lordship called in the assistance of Chief Justice Tindal, and the Lord Chief Baron, (Lord Lyndhurst), before whom the case was argued, and, on the 28th of January, 1833, Chief Justice Tindal delivered the unanimous opinion of the three Judges, deciding that the evidence to prove that the testator intended to devise his estates in the county of Clare was inadmissible, and that the order of the Vice-Chancellor, directing the issue, should be reversed.

181. The judgment,² after observing that the main question between the parties was, whether parol evidence was admissible to show the testator's intention that his real estates in the county of Clare should pass by his will, and stating the facts of the case,³ proceeded as follows:—"It may be admitted, that in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further evidence, *upon the same subject*, calculated to explain what was the estate, or subject-matter, really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, '*Ambiguitas verborum latens, verificatione suppletur.*'"

"But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first

¹ *Supra*, pl. 147.

² 8 Bing. 244. [See the observations on this case in *Lindgren v. Lindgren*, 9 Beav. 364; *infra*, pl. 194, note.]

³ *Supra*, pl. 147.

class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator it is found, that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively, parol evidence is admissible to show which manor was intended to pass, and which son was intended to take. (Bac. Max. 23; Hob. Rep. 32; Edward Altham's case, 8 Rep. 155.)¹ The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. As where an estate is devised called A., and is described in the occupation of B., and it is found that though there is an estate called A., yet the whole is not in B.'s occupation; or where an estate is devised to a person whose surname or Christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show what estate is intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence.

“But the case now before the Court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or, indeed, any description whatever of the estates in Clare.

¹ *Infra*, p. l. 184.

The present case is rather one in which the plaintiff does not endeavor to apply the description contained in the will to the estates in Clare, but, in order to make out such intention, is compelled to introduce new words and a new description into the body of the will itself.

“The testator devises all his estates in the county of Limerick and the city of Limerick. There is nothing ambiguous in this devise on the face of the will. It is found, upon inquiry, that he had property in the city of Limerick, which answers to the description in the will, but no property in the county. This extrinsic evidence produces no ambiguity, no difficulty in the application of the words of his will to the state of the property as it really exists.¹ The natural and necessary construction of the will is, that it passes the estate which he has in the city of Limerick, but passes no estate in the county of Limerick, where the testator had no estate to answer that description.

“The plaintiff, however, contends, that he has a right to prove, that the testator intended to pass not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare; and that the will is to be read and construed as if the word ‘Clare’ stood in the place of, or in addition to, that of Limerick.

“But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, *as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will.* It is not simply removing a difficulty, arising from a defective or mis-

¹ *Infra*, pl. 188.

taken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect *as the filling up a blank*, which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted.

“Now, the first objection to the introduction of such evidence is, that it is inconsistent with the rule which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator’s intention is to be collected from the words used in the will, and that words which he has not used cannot be added. *Denn v. Page*.¹

“But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is, by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of Clare was for some time in the custody of the testator, and, therefore, open for his inspection; which copy was afterwards executed by him with all the formalities required by the Statute of Frauds; the presumption is, that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee, altogether omitted in the will? If it is admissible to *introduce*

¹ 3 Term R. 87.

new matter of devise, or a new devisee, why not to *strike out* such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in his lifetime, would really be made by the attorney after his death; that all the guards intended to be introduced by the Statute of Frauds would be entirely destroyed, and the statute itself virtually repealed.

“And upon examination of the decided cases on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above adverted to,—that an uncertainty, which arises from applying the description contained in the will either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself.

“Thus, in the case of *Lowe v. Lord Huntingtower*,¹ in which it was held that evidence of collateral circumstances was admissible, as of the ages of the several devisees named in the will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will; such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will consistent with the real state of his property and family; the evidence is produced to prove facts, which, according to the language of Lord Coke, in 8 Rep. 155, ‘stand well with the words of the will.’

¹ 4 Russ. Rep. 581, n.

"The case of *Standen v. Standen*,¹ decides no more, than that a devise of all the residue of the testator's real estate, where he has no real estate at all, but has a power of appointment over real estate, shall pass such estate over which he has the power, though the power is not referred to. But this proceeds upon the principle that the will would be altogether inoperative, unless it is taken that, by the words used in the will, the testator meant to refer to the power of appointment.

"The case of *Mosley v. Massey*,² does not appear to bear upon the question now under consideration. After the parol evidence had established that the local description of the two estates mentioned in the will had been transposed by mistake, the county of Radnor having been applied to the estate in Monmouth and *vice versa*; the Court held that it was sufficiently to be collected, from the words of the will itself, which estate the testator meant to give to the one devisee, and which to the other, independent of their local description; all, therefore, that was done, was to reject the local description, as unnecessary, and not to import any new description into the will.

"In the case of *Selwood v. Mildmay*,³ the testator devised to his wife part of his stock in the £4 per cent. Annuities of the Bank of England; and it was shown by parol evidence, that, at the time he made his will, he had no stock in the £4 per cent. Annuities, but that he had some which he had sold out, and had invested the produce in Long Annuities. And in this case it was held, that the bequest was in substance a bequest of stock, using the words as a denomination, not as the

¹ 2 Ves. jun. 589.

² 8 East, 149.

³ 3 Ves. jun. 306. [*Supra*, page 191.]

identical *corpus* of the stock; and as none could be found to answer the description but the Long Annuities, it was held that such stock should pass rather than the will be altogether inoperative.

“This case is certainly a very strong one; but the decision appears to us to range itself under the head, that ‘*falsa demonstratio non nocet*,’ where enough appears upon the will itself to show the intention after the false description is rejected.¹

“The case of *Goodtitle v. Southern*² falls more closely within the principle last referred to. A devise ‘of all that my farm called *Troque’s Farm*, now in the occupation of A. C.’ Upon looking out for the farm devised, it is found that part of the lands which constituted *Troque’s Farm* are in the occupation of another person. It was held, that the thing devised was sufficiently ascertained by the devise of ‘*Troque’s Farm*, and that the inaccurate part of the devise might be rejected as surplusage.

“The case of *Day v. Trigg*³ ranges itself precisely in the same class. A devise of ‘all the testator’s freehold houses in *Aldersgate street*,’ when, in fact, he had no freehold, but had leasehold houses there. The devise was held in substance and effect to be a devise of his *houses* there; and that, as there were no freehold houses there to satisfy the description, the word ‘freehold’ should rather be rejected than the will be totally void.

“But neither of these cases afford any authority in favor of the plaintiff; they decide only that where there is a sufficient description in the will to ascertain the thing devised, a part of the description which

¹ See *Hiscocks v. Hiscocks*, *infra*, *pl.* 183.

² 1 M. & S. 299.

³ 1 P. Wms. 286.

is inaccurate may be rejected, not that anything may be added to the will; thus following the rule laid down by Anderson, C. J., in *Godb. Rep.* 131.—‘An averment to take away any surplusage is good, but not to increase that which is defective in the will of the testator.’¹

“On the contrary, the cases against the plaintiff’s construction appear to bear more closely on the point. In the first place, it is well established, that where a complete blank is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator. *Hunt v. Hort*,² and in many other cases.

“Now the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised, which is left altogether in blank. And it requires a very nice discrimination to distinguish between the case of a will, where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in *Clare*.

“In the case of *Doe d. Oxenden v. Chichester*,³ it was held by the House of Lords, in affirmance of the judgment below, that, in the case of a devise of ‘my estate of Ashton,’ no parol evidence was admissible to show that the testator intended to pass not only his lands in Ashton, but in the adjoining parishes, which he had been accustomed to call by the general name of his Ashton estate. The Chief Justice of the Common Pleas, in giving the judgment of all the Judges, says, ‘If a testator should devise his lands of or in Devonshire or Somersetshire, it would be impossible to say that you

¹ *Infra*, pl. 190.

² 3 Bro. C. C. 311.

³ 4 Dow. P. C. 65. [*Supra*, page 72.]

ought to receive evidence that his intention was to devise lands out of those counties.' Lord Eldon, then Lord Chancellor, in page 90 of the Report, had stated in substance the same opinion. The case so put by Lord Eldon and the Chief Justice is the very case now under discussion.

"But the case of *Newburgh v. Newburgh*, decided in the House of Lords on the 16th of June, 1825,¹ appears to be in point with the present. In that case, the appellant contended that the omission of the word '*Gloucester*' in the will of the late Lord Newburgh, proceeded upon a mere mistake, and was contrary to the intention of the testator at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself, as from other extrinsic evidence, that the testator intended to devise to her an estate for life as well in the estate in Gloucester, which was not inserted in the will, as in the county of Sussex, which was mentioned therein.

"The question, 'whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word '*Gloucester*' had been inserted in the will,' was submitted to the Judges; and Lord Chief Justice Abbott declared it to be the unanimous opinion of those who had heard the argument, that it could not.

"As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue, and that it would, therefore, be

¹ [1 M. & Sc. 352, on appeal from Sir John Leach, V. C., 5 Madd. 364.]

useless to grant the issue in the terms directed by the Vice-Chancellor."

182. In *Doe d. Gord v. Needs*,¹ the will contained a devise to George Gord, the son of John Gord; another to George Gord, the son of George Gord; and a third, after the expiration of certain life estates, to *George Gord, the son of Gord*. The Court held, that the evidence of the testator's declarations was admissible to show that he intended that the house devised to "George, the son of Gord," should go to George, the son of George Gord. The rule of law is so fully explained in this case, that the author trusts he shall be excused for inserting the judgment at length, notwithstanding the reasons which may suggest themselves to the reader, why we should have omitted it. "The only point, therefore," said Parke, B.,² "remaining to be considered is, whether evidence was properly admitted of the devisor's declarations to show what person he meant to designate by the description of 'George Gord, the son of Gord.' And we are of opinion that such evidence was properly admitted. If, upon the face of the devise, it had been uncertain whether the devisor had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual; such would have been a case of *ambiguitas patens*, within the meaning of Lord Bacon's rule,³ which ambiguity could not be holpen by averment; for to allow such evidence would be, with respect to that subject, to cause a parol will to operate as a written one; or, adopting the language of Lord Bacon, 'to make that pass without writing, which the law appointeth shall not pass but by writing.' But here,

¹ 2 M. & W. 129.

² 2 M. & W. 139.

³ Maxims, 25.

on the face of the devise, no such doubt arises. There is no *blank* before the name of Gord the father, which might have occasioned a doubt whether the devisor had finally fixed on any *certain* person in his mind. The devisor has clearly selected a particular individual as the devisee. Let us then consider, what would have been the case, if there had been no mention in the will of any *other* George Gord, the son of a Gord; on that supposition there is no doubt, upon the authorities, but that evidence of the testator's intention, as proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed in order to enable the Court to place itself in the situation of the devisor, and to construe his will, it would have appeared that there were at the date of the will *two* persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon of a *latent* ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is that he has the manors both of North S. and South S.; in which case Lord Bacon says, 'It shall be holpen by averment, whether of them was that which the party intended to pass.' The case is also exactly like that mentioned by Lord Coke in Altham's case;¹ 'If A. levies a fine to William his son, and A. has two sons named William, the averment that *it was his intent* to levy the fine to the younger is good, and *stands well with the words of the fine.*' Another case is put in Crounden v. Clarke² which is in point: 'If one devise to his son John, where he has two sons of that name;' and the same rule was acted upon in the recent case of Doe v. Morgan.³ The characteristic of all these cases is, that the

¹ 8 Rep. 155 a.² Hob. 32.³ 1 C. & M. 235.

words of the will *do* describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the Court to reject one of the subjects or objects, to which the description in the will applies; and to determine which of the two the devisor understood to be signified by the description which he used in the will. This subject has been most ably discussed by Mr. Wigram, in his excellent treatise on the rules of law respecting the admission of extrinsic evidence in the interpretation of wills. There would, then, have been no doubt whatever of the admissibility of evidence of the devisor's intention, if the devise to 'George the son of Gord,' had stood alone, and no mention had been made in the will of George the son of *John* Gord, and George the son of *George* Gord. But does the circumstance that there are two persons named in the will, each answering the description of 'George the son of Gord,' prevent the application of this rule? We are of opinion that it does not. In truth the mention of persons by those descriptions in other parts of the will, has no more effect, for this purpose, than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had: it shows that there were two persons, to either of whom the description would be applicable, and that such two persons were both known: and the present case really amounts to no more than this, that the person to whom the imperfect description appears on the parol evidence to apply, is described in other parts of the same will, by a more full and perfect description, which excludes any other object than himself. Still he is pointed out in the devise itself by a description, which, so far as it goes, is perfectly correct. In the case of *Doe v.*

Morgan, above referred to, precisely the same circumstance occurred.”¹

183. In *Hiscocks v. Hiscocks*,² a testator devised lands to his son John for life; and, from his decease, to the testator's grandson, John H., *eldest son* of the said John H., for life, with remainders over. At the time of making his will, the testator's son John H. had been twice married. By his first wife he had one son Simon, and by his second wife an eldest son John, and other younger children, sons and daughters. Simon and John, the grandsons of the testator, both claimed the lands. The question was, whether evidence of the testator's *intention*, consisting of instructions given for his will, and declarations made by him after his will, were admissible. The judgment of the Court was as follows:—‘This was an action of ejectment brought on the demise of Simon Hiscocks against John Hiscocks. The question turned on the words of a devise in the will of Simon Hiscocks, the grandfather of the lessor of the plaintiff and of the defendant. By his will, Simon Hiscocks, after devising estates to his son Simon for life, and, from and after his death, to his grandson Henry Hiscocks in tail male, and making, as to certain other estates, an exactly similar provision in favor of his son John for life; then, after his death, the testator devises those estates to ‘my grandson John

¹ [See *Doe d. Allen v. Allen*, 12 Ad. & Ell. 451.]

² 5 M. & W. 363 (1832). The only way (if any) by which, in this case, either claimant could have approached the end he aimed at, would, perhaps, have been by contending that the words in the will, which were applicable to his opponent, were *not the testator's words* (see the cases, *supra*, *pl.* 152, note). This point was not open in the argument in the Exchequer, as the whole instrument appears to have been proved or admitted to contain nothing but the testator's words. The effect, however, of striking out words (as not being the words of the testator) in a case like *Hiscocks v. Hiscocks*, would be the opposite of that in the cases above referred to in this note. It would create a devise and not an intestacy.

Hiscocks, eldest son of the said John Hiscocks.' It is on this devise that the question wholly turns. In fact, John Hiscocks the father had been twice married; by his first wife he had Simon, the lessor of the plaintiff, his eldest son: the eldest son of the second marriage was John Hiscocks, the defendant. The devise, therefore, does not, both by name and description, apply to either the lessor of the plaintiff, who is the eldest son, but whose name is Simon, nor to the defendant, who, though his name is John, is not the eldest son. The cause was tried before Mr. Justice Bosanquet, at the Spring Assizes for the county of Devon, 1838, and that learned Judge admitted evidence of the instructions of the testator for the will, and of his declarations after the will was made, in order to explain the ambiguity in the devise, arising from this state of facts; and the verdict having been found for the lessor of the plaintiff, a rule has been obtained for a nonsuit or new trial, on the ground that such evidence of intention was not receivable in this case. And after fully considering the question, which was very well argued on both sides, we think that there ought to be a new trial. It must be admitted, that it is not possible altogether to reconcile the different cases that have been decided on this subject; which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts

and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects or his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of cotemporary authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate and often necessary evidence, to enable us to understand the meaning and application of his words. Again,—the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will. But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each

answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls ‘an equivocation,’ *i. e.*, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator’s intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will. It must be owned, however, that there are decided cases which are not to be reconciled with this distinction in a manner altogether satisfactory. Some of them, indeed, exhibit but an apparent inconsistency. Thus, for example, in the cases of *Doe v. Huthwaite*¹ and *Bradshaw v. Bradshaw*,² the only thing decided was, that, in a case like the, present, *some* parol evidence was admissible. There, however, it was not decided that evidence of the testator’s intention ought to be received. The decisions, when duly considered, amount to no more than this, that where the words of the devise, in their primary sense, when applied to the circumstances of the family and the property, make the devise insensible, collateral facts may be resorted to, in order to show that in some secondary sense of the words—and one in which the

¹ *Supra*, pl. 133.² *Infra*, pl. 183, note.

testator meant to use them—the devise may have a full effect. Thus, again, in Cheyney's case, and in Croudnen *v.* Clarke, 'the averment is taken' in order to show which of two persons, *both equally described* within the words of the will, was intended by the testator to take the estate; and the late cases of Doe *d.* Morgan *v.* Morgan,¹ and Doe *d.* Gord *v.* Needs,² both in this court, are to the same effect. So, in the case of Jones *v.* Newman, according to the view the Court took of the facts, the case may be referred to the same principles as the former. The Court seem to have thought the proof equivalent only to proof of their being two J. C.'s, strangers to each other, and then the decision was right, it being a mere case of what Lord Bacon calls equivocation. The cases of Price *v.* Page,³ Still *v.* Hoste,⁴ and Careless *v.* Careless,⁵ do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivocal description is not entirely accurate; but they agree in its being (although inaccurate) equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either, as in Price *v.* Page, a mere blank, or, as in the other two cases, applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation; and, in that case, evidence of the intention of the testator seems to be receivable. But there are other cases not so easily explained, and which seems at variance with the true principles of evidence. In Selwood *v.* Mildmay,⁶ evidence of instructions for the will was received. That case was doubted in Miller *v.* Travers;⁷ but per-

¹ [1 Cr. & M. 235.]

² [*Supra*, p. 222.]

³ [*Supra*, page 196.]

⁴ 6 Mad. 192; *supra*, pl. 112.

⁵ [1 Mer. 384.]

⁶ 3 Ves. jun. 306; *supra*, pl. 131.

⁷ [See observations on this judgment in Lindgren *v.* Lindgren, 9 Beav. 365; *infra*, pl. 194, note.]

haps, having been put by the Master of the Rolls as one analogous to that of the devise of all a testator's freehold houses in a given place, where the testator had only leasehold houses, it may, as suggested by Lord Chief Justice Tindal in *Miller v. Travers*, be considered as being only a wrong application to the facts of a correct principle of law. Again, in *Hampshire v. Pierce*, Sir John Strange admitted declarations of the intentions of the testatrix to be given in evidence, to show that by the words, 'the four children of my niece Bamfield,' she meant the four children by the second marriage. It may well be doubted whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family, and their ages, which no doubt were admissible, were quite sufficient to have sustained the judgment without the questionable evidence. And it may be further observed, that the principle with which Sir J. Strange is said to have commenced his judgment, is stated in terms much too large, and is so far inconsistent with later authorities. *Beaumont v. Fell*,¹ though somewhat doubtful, can be reconciled with true principles, upon this ground, that there was no such person as Catharine Earnley, and that the testator was accustomed to address Gertrude Yardley by the name of Gatty. This, and other circumstances of the like nature, which were clearly admissible, may perhaps be considered to warrant that decision; but there the evidence of the testator's declarations as to his intention of providing for Gertrude Yardley was also received; and the same evidence was received at *Nisi Prius* in *Thomas v. Thomas*,² and approved on a motion for a new trial, by the *dicta* of Lord Kenyon and Mr. Justice Lawrence. But these cases seem to us at

¹ *Supra*, pl. 143.

² *Supra*, pl. 140.

variance with the decision in *Miller v. Travers*, which is a decision entitled to great weight. If evidence of intention could be allowed for the purpose of showing that by Catharine Earnley and Mary Thomas, the respective testators meant Gertrude Yardley and Elinor Evans, it might surely equally be adduced to prove that, by the county of Limerick, a testator meant the county of Clare. Yet this was rejected, and we think rightly. We are prepared on this point (the point in judgment in the case of *Miller v. Travers*) to adhere to the authority of that case. Upon the whole, then, we are of opinion, that in this case there must be a new trial. Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the devise void for uncertainty; but the cases of *Doe v. Huthwaite*,¹ *Bradshaw v. Bradshaw*,² and others, are authorities against this conclusion. If therefore, by looking at the surrounding facts to be found by the jury, the Court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will. If the evidence does not enable the Court to give such a direction to the jury, the defendant will indeed for the present succeed; but the claim of the heir-at-law

¹ *Supra*, pl. 133,

² *Infra*, next page, note.

will probably prevail ultimately, on the ground that the devise is void for uncertainty."¹

Observations upon the Judgments in Miller v. Travers, on appeal, Gord v. Needs, and Hiscocks v. Hiscocks.

184. I. From these judgments it will appear, that the decisions have affirmed the doctrine, that where the description, in the will, of the *person* or *thing* intended, is applicable with legal certainty to each of several subjects, extrinsic evidence is admissible to prove which of such subjects was intended by the testator.²

185. The cases of *Richardson v. Watson*, already referred to,³ and *Morgan v. Morgan*,⁴ are to the same effect.

186. It can scarcely be necessary to observe, that, in order that a case may be brought within the scope of this Proposition, it is not necessary that the description in the will should be in all respects *accurate or perfect*.

¹ In *Bradshaw v. Bradshaw*, 2 Y. & Coll. 72, the will contained devises to *Robert*, the *second* son of the testator's daughter, E. B., with remainder to his first and other sons in tail male, remainders (as to part of the property) to the *third, fourth, fifth*, and every other son of E. B. severally and successively in tail male, with remainder to the testator's right heirs. E. B. had no second son named *Robert*. The name of her eldest son was *Robert*, and that of the second son *Henry*. [Suppose a devise to George James the son of William, and that William had two sons named respectively George and James, would evidence be admissible to prove that either was intended?]

² *Supra*, Prop. VII. [In *Hare v. Cartridge*, 13 Sim. 165, the testator bequeathed his residue unto and among his first cousins, the children of his father's *brother*, of the name of Cartridge. The testator's father had *two* brothers of that name, both of whom died during the testator's lifetime, leaving children. Sir L. Shadwell held that the bequest was not void for uncertainty, but that the children of *both* the brothers were entitled to share in the residue. See also *Richards v. Patteson*, 15 Sim. 501.]

³ *Supra*, pl. 40.

⁴ 1 Crompt. & M. 235.

All that the law requires on this point is, that the description shall be so far perfect as to describe with *legal certainty*¹ each of the subjects to which it is sought to be applied,—it must (as a description) satisfy the mind of the judge, that it does describe the subject to which he applies it,—it must, as a description, be *sufficient to his mind*.²

187. With respect to the particular evidence which is admissible for the purpose of determining which of several subjects was intended by the testator,—where the description in the will is applicable to more than one subject,—as the question in such cases is, what the

¹ *Supra*, pl. 126, and note the judgment in *Hiscocks v. Hiscocks* upon this point, *supra*, pl. 183. [See the author's argument in *Blundell v. Gladstone*, 11 Sim. 477.]

² *Supra*, pl. 129. [In *Bennett v. Marshall*, 2 Kay & Joh. 740, the testator devised to 'William Marshall, his second cousin.' It appeared that he had no second cousin named William Marshall; but that he had two first cousins once removed, one named William Marshall, *simpliciter*, the other named William John Robert Blandford Marshall. Sir W. P. Wood, V.C., admitted parol evidence as to the intention of the testator, and decided, upon such evidence, that the cousin last named was the one whom he intended to benefit.

In this case, the extrinsic evidence proved, not only that the testator had made a mistake, but that the sense in which he used the words 'second cousin' was 'first cousin once removed,' and appears to have reduced the case as between the two claimants to the same condition as it would have been in had the testator used the words 'first cousin once removed' in his will instead of 'second cousin.'

Could the Court in that case have admitted evidence to prove that the legatee William Marshall, whose description upon this hypothesis was altogether correct, was *not* the person intended, but that W. J. R. B. Marshall, who was incorrectly described, was the person intended?

After hearing the evidence and the arguments thereupon, the Vice-Chancellor is reported to have remarked that, if the evidence had been perfectly balanced, he must have held William Marshall entitled under the devise, in preference to W. J. R. B. Marshall. Was not this an admission, that the object of the testator's bounty was *not* described in terms which were applicable *indifferently* to more than one person? [See the Proposition.]

testator *intended* to have expressed; any evidence, which *upon general principles* is relevant and material to that inquiry, will be admissible. And it seems, from the cases which have been referred to, that facts affording an inference of intention,¹ and declarations by the testator at the time of making his will,² are equally admissible. Declarations of intention, however, made before³ or after⁴ the date of the will, are, it is said, inadmissible.⁵ This distinction does not appear to have been adverted to in all the cases which have been referred to. It is a distinction depending upon the general rules of evidence, and is unaffected by any principle peculiar to the subject of this work.⁶

188. II. The cases have also decided, that if the description of the person or thing be wholly inapplicable to the subject intended, or said to be intended by it,

¹ Selwood v. Mildmay, *supra*, pl. 131; Doe d. Le Chevalier v. Huthwaite, *supra*, pl. 133.

² Thomas v. Thomas, 6 T. R. 671, *supra*, pl. 140, and the cases *supra* from pl. 131 to pl. 148.

³ Thomas v. Thomas, *ubi supra*, n.; Strode v. Russell, 2 Vern. 625; Oldman v. Slater, 3 Sim. 84.

⁴ 2 Vern. 625.

⁵ As to the comparative value of declarations made before, at the time of, or after, making the will, see [per Lord Eldon, 6 Ves. 398, and cases there cited;] Murless v. Franklin, 1 Swans. 13; N. B. Trimmer v. Bayne, 7 Ves. 508; Langham v. Sandford, 2 Mer. 23; [s. c. 19 Ves. 649;] Conolly v. Lord Howe, 5 Ves. 700; Strode v. Russell, 2 Vern. 625; Thomas v. Thomas, 6 T. R. 671; Richardson v. Watson, 4 B. & Adol. 787; Whittaker v. Tatham, 7 Bing. 628. ["Cases are referred to in the books, to show that declarations contemporaneous with the will are alone to be received; but, on examination, none of them establish such a distinction. Neither has any argument been adduced which convinces us that those subsequent to the will ought to be extended, wherever any evidence of declarations can be received. They may have more or less weight, according to the time and circumstances under which they were made, but their admissibility depends entirely on other considerations." Per Lord Denman, C. J., in Doe d. Allen v. Allen, 12 Ad. & Ell. 455.]

⁶ See as to this Hiscocks v. Hiscocks, *supra*, pl. 183.

evidence is inadmissible to prove who or what the testator really intended to describe. The Chief Justice of the Court of Common Pleas appears, indeed, in one part of the judgment in *Miller v. Travers*, to lay some stress upon the circumstance, that "the devise in question had a certain operation and effect, namely, the effect of passing the estate in the city of Limerick."¹ It is impossible, however, to read the whole judgment without seeing that the grounds upon which it proceeded are wholly independent of that circumstance, and that the objections there pointed out, to the admission of extrinsic evidence *to prove intention*, would have applied with equal force whether the will had contained a devise of land in the *city* of Limerick or not. The devise of lands in the *county* of Limerick was *independent* of that in the *city* of Limerick, and the will would not have expressed more plainly than it did, an intention to devise *other* lands than those which the testator had in the *city* of Limerick, if this latter devise had been wholly omitted. Where the terms of a *single* devise can be in any way satisfied, the argument against enlarging its effect is irresistible. But, where there are two distinct devises, the fact that one of them is satisfied cannot furnish an argument for refusing to give effect to the other.

189. III. The decisions have also overruled the distinction taken in *Selwood v. Mildmay*² as to the *substance* of the thing intended being sufficiently described, and the *denomination* only mistaken; for clearly the testator in *Miller v. Travers*, intended to devise some *real estate* besides that in the city of Limerick. This, indeed, is involved in the last observation.

¹ *Supra*, pl. 181.

² *Supra*, pl. 131. [See *Lindgren v. Lindgren*, *infra*, page 239, note.]

190. IV. The cases of *Day v. Trig* and *Goodtitle v. Southern*, cited in the judgment in *Miller v. Travers*, do not touch the question of admitting extrinsic evidence *to prove intention*. For in those cases, after rejecting words of mere surplusage, there remained (as the Chief Justice observed) a "sufficient description in the will to ascertain the thing devised."¹ The question of admitting extrinsic evidence *to prove intention* does not, therefore, arise in such cases. In cases like the latter, indeed, a question might be made whether the words referring to *the occupation of the farm* were not restrictive; and if admitted to be so, a Court would (so long as it received the instrument as the will of the testator) be bound to give effect to them.² But, in that particular case, the Court was of opinion, *upon the construction of the words alone*, that they were not restrictive, but mere surplusage, and that the only operative words in the devise³ were, "all that my farm called Trogue's Farm."

191. V. In *Miller v. Travers*, the learned Judge said, that there were two classes of cases only to which the maxim "*Ambiguitas verborum latens verificatione suppletur*," applied, and these cases he illustrates with great exactness.⁴ The learned reader, however, may perhaps still consider that a class of cases, which existed before the decision in *Miller v. Travers*, has not been satisfactorily adjudicated upon by the decision in that case. The judgment of the Vice-Chancellor in that case, and the judgments in previous cases already re-

¹ *Supra*, pl. 181, p. 217. See *Doe d. Smith v. Galloway*, 5 B. & Adol. 43.

² Proposition II.

³ See per Littledale, J., in *Richardson v. Watson*, 4 B. & Adol. 797.

⁴ *Supra*, pl. 181, page 213.

ferred to, had decided that a description *wholly* inapplicable to the subject intended might be corrected by evidence *proving the intention* of the testator; from which it would follow, of course, that a description *partially* correct might be aided by the same means, although such description, when taken in connection with the circumstances of the case alone, might not be sufficient to satisfy the mind of a Judge. A case, however, might easily be suggested, in which a Judge, knowing *abunde* for whom or for what an imperfect description was intended, would discover a sufficient certainty to act upon, although, if ignorant of the intention, he would be far from finding judicial certainty in the words of the devise. The question, then, which *Miller v. Travers* may be considered as having left undecided, is,—whether extrinsic evidence *to prove intention* is admissible in the case of such a description as that which has just been suggested? The question arises from the high authority of the case of *Beaumont v. Fell*,¹ which is a case in point. There was no resemblance in that case between the names of *Gertrude Yardley* and *Catharine Earnley*, except in the resemblance *in sound* between Gatty and Katy, which possibly might (as the Court ingeniously guessed) have occasioned the mistake in the will. Assuming that the Court could not, in such a case, act upon the description in the will *without first inquiring who was really intended*, could such an inquiry be lawfully gone into?

192. The case of *Hiscocks v. Hiscocks* has decided this point also. In point of principle, it is submitted, that a description which is so imperfect as to be *useless as it stands*, *i. e.* useless unless it be aided *by evidence*

¹ *Supra*, pl. 143.

of intention, is not distinguishable from one which is wholly incorrect.¹

193. VI. The case of *Selwood v. Mildmay*,² as explained in *Miller v. Travers*,³ proceeded upon a correct principle: but that principle, it is submitted, was altogether misapplied, and the case is one which ought not to be followed in specie. Upon this point, also, the decision in *Hiscocks v. Hiscocks* appears to be conclusive.⁴

The case of *Beaumont v. Fell*, just adverted to, is one which is extremely difficult, if not impossible to reconcile with *Miller v. Travers*, unless it be upon the ground that the description of the legatee was, in the circumstances of that case, sufficient without reference to what the testator *had declared*. The difficulty in the way of this explanation is, that the case is always referred to as a leading authority for the admissibility of evidence to *prove intention* in cases in which the description of the *person* or *thing* intended is sufficient without the aid of such evidence. The case is pointedly noticed with disapprobation in *Hiscocks v. Hiscocks*.⁵

The MS. case (*supra*, pl. 146) is clearly overruled by

¹ See *Smart v. Prujean*, 6 Ves. 565. "The rule of law is, that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated, *in such a way that the Court can be under no mistake*." See also *Dillon v. Harris*, 4 Bligh. N. S. 321.

² *Supra*, pl. 181.

³ *Supra*, pl. 181.

⁴ [*Lindgren v. Lindgren*, page 241.]

⁵ *Supra*, pl. 183. ["It is *not* pointedly noticed with disapprobation in *Hiscocks v. Hiscocks*." See per Lord Brougham, in *Mostyn v. Mostyn*, 5 Ho. Lo. Cas. 167.]

Miller v. Travers,¹ and the two subsequent cases of Gord v. Needs, and Hiscocks v. Hiscocks.²

¹ One of the learned Judges, whose opinion upon this MS. case is referred to in page 121, has since informed the writer that he now considers that opinion erroneous.

² [In Lindgren v. Lindgren, 9 Beav. 358, the testatrix, by her will, dated in 1843, expressed herself as follows:—"I hereby give and bequeath unto A. Lindgren £500 of the stock 3 per cent. Consols *now standing in my name* in the books of the Bank of England." This bequest was followed by five other bequests to different persons of £100 each "of the said 3 per cent. Consols," and there was a general residuary gift. Testatrix died two months after making her will, and had not at the date of such will, or at her death, any stock whatever standing in the Bank Books. It appeared, however, that in 1840 she had had a sum of £1,000 Consols (equivalent in amount to the aggregate of the bequests above stated) standing in her name, which she sold out, and handed over the cash to the said A. Lindgren (the plaintiff), requesting him to take charge of the same and give her interest for it to the amount which she had previously received for the actual stock. This interest the said A. Lindgren regularly paid her up to the date of her will. It was argued for the defendant, the residuary legatee, that the above mentioned several bequests failed altogether for want of the subject purported to be bequeathed; and that extrinsic evidence was inadmissible.

Lord Langdale, M. R., said:—"I cannot assume that the testatrix meant nothing by her bequest, or that she caused it to be inserted in her will in mere mockery, meaning only to delude and disappoint the objects of a pretended bounty.

"It ought rather to be assumed that she had a rational meaning; and the real question is, whether that meaning, or the true effect of her will, can be discovered by the addition of evidence, consistently with the rules of the law.

"Upon the face of the will all is clear and free from ambiguity; whatever ambiguity there may be, it is latent. No difficulty occurs, till it appears, by evidence from without, that the testatrix had not, at the date of her will, the stock which she purported to bequeath.

"The authority principally relied on by the plaintiff and the defendants who concur with him, is the case of Selwood v. Mildmay (*supra*, pl. 131). In that case, the testator was possessed of certain 4 per cent. Bank Annuities. He sold the whole in February, 1792, and with the produce purchased Long Annuities. From February, 1792 (the time of the sale), at the date of his will, and up to the time of his death, he held no 4 per cent. Bank Annuities. By his will, dated the 26th day of January, 1796, he gave to his wife Elizabeth the interest and proceeds of £1,250, which he described to be 'part of his stock in the 4 per cent. Annuities of the Bank

194. VII. The conclusion, then, which these cases appear to warrant, is, that the only cases in which *evidence to prove intention* is admissible, are those in which

of England, for and during the term of her natural life, together with such dividends as should be due upon the said £1,250 at the time of his decease; and, after the decease of his wife, he gave the said stock to several of his relations, in certain shares and proportions, always calling it his 4 per cent. stock, and he disposed of the residue. There being an ambiguity on the face of the will, it was held that evidence ought to be admitted 'to prove, not that there was a mistake, for that was clear, but to show how it arose,'—'that it was clear the testator meant to give a legacy, but mistook the fund. He acted upon the idea that he had such stock.' If the testator 'had had the stock at the time, it would have been considered that the legacy was specific, and that he meant that identical stock, and any act of his destroying that subject would be a proof of *animus revocandi*; but if it was a denomination, and not the identical corpus, in that case if the thing itself could not be found, and there was a mistake as to the subject out of which it was to arise, that would be rectified;' and it was declared, that the legatees of the £1,250 stock were entitled to be paid their legacies out of the personal estate.

"It is very necessary to observe, that in the case of *Selwood v. Mildmay* the evidence was received, only for the purpose stated by the Master of the Rolls in his judgment, and not, as it has been erroneously supposed, for the purpose of showing that the testator, when he used the erroneous description of 4 per cent. stock, meant to bequeath the Long Annuities which he had purchased with the produce of the 4 per cent. stock; and that the result of the cause was, not to substitute another specific subject in the place of a specific legacy which the will purported to bequeath;—not to substitute the Long Annuities, which the testator had and did not purport to give, for the 4 per cent. Bank Annuities, which he had not and did purport to give. The absence of the fund purported to be given, showing that a specific legacy was not intended, other evidence was admitted to show how the mistake arose; and this being clearly shown, it was held, that the legatees were entitled to payment out of the general personal estate; and the decree declared, that the legatees were entitled to be paid their legacies to the amount of the Bank 4 per cent. Annuities purported to be given, and that such legacies were to be valued according to the market price the Bank 4 per cent. Annuities bore on the day of the testator's death. This was the principle of the decree; but on the allegation that the estate was not sufficient to pay the legacies in full, provision was made for their abatement and for payment of certain debts; and it was ordered that the Long Annuities should be sold, and the proceeds applied as was directed.

"The circumstances of *Selwood v. Mildmay* are very like those of the

the description in the will is *unambiguous* in its application to each of several subjects.

195. The reader need scarcely be reminded, that, consistently with the conclusion which confines the ad-

case now under consideration; and I think that, if that authority has not been overruled, I ought to be governed by it.

"The cases of *Miller v. Travers* (*supra*, *pl.* 181), and *Hiscocks v. Hiscocks* (*supra*, *pl.* 183), were cited, for the purpose of showing that *Selwood v. Mildmay* has been overruled. In the former (*Miller v. Travers*), the testator devised all his freehold and real estates in the county of Limerick and in the city of Limerick to trustees and their heirs. He had no real estate in the county of Limerick, but a small real estate in the city of Limerick, and considerable estates in the county of Clare. It was held that parol evidence was not admissible to show that the testator's intention was, that his real estates in the county of Clare should pass. In the judgment, the case of *Selwood v. Mildmay* is mentioned, as if it had been held, that the Long Annuities which had been purchased with the 4 per cent. stock should pass, rather than that the will should be altogether inoperative, which appears to have been a mistake. The false description was rejected, and the legacies, as I have stated, were held to be payable, not by a substitution of the Long Annuities, but out of the general personal estate, of which the Long Annuities were part. No evidence was admitted for the purpose of showing that the testator meant specifically to bequeath the Long Annuities, when he used the description of 4 per cent. stock. The case of *Miller v. Travers* does not therefore appear to me to be inconsistent with *Selwood v. Mildmay*.

"In *Hiscocks v. Hiscocks*, the testator devised to his son John Hiscocks for life, remainder to John his eldest son for life, remainder over. At the date of the will, John Hiscocks, the son, the first devisee for life, had been twice married; he had one son, Simon, by his first wife, and by his second wife an eldest son, John. Evidence of the instructions given by the testator for his will, and declarations of his intentions, were not admitted to prove which of the two grandsons was meant. In this case, *Selwood v. Mildmay* is noticed as having been doubted in *Miller v. Travers*. The erroneous view of it which appears to have been taken is not noticed; and, when it is remarked that evidence of instructions for the will was received, it is not observed that it was only admitted as part of the evidence to show how the mistake was made, *i. e.* for the purpose of showing that the erroneous description was copied from a former will. Under these circumstances, I do not think that the case of *Selwood v. Mildmay* is overruled by the cases of *Miller v. Travers* and *Hiscocks v. Hiscocks*; and, considering myself to be bound by the authority, I shall make a similar decree, declaring that the several legatees are entitled to their several legacies, to the amount of £1,000 Bank 3 per cent. Annuities; and that such

missibility of *evidence to prove intention* to this class of cases, a testator's *declarations* may be admissible

legacies are to be valued according to the market price the 3 per cent. Bank Annuities bore on the day of the testatrix's death."

In the above case, there was nothing in the context from which it was apparent that the testatrix had used the words in which she assumed to describe the subject of her bequest, in any other than their strict and primary meaning. But the words so construed were insensible with reference to extrinsic circumstances, and the Court therefore properly directed an inquiry, with the view, if possible, of applying the words in some secondary sense.

Now, it may safely be conceded, that when the extrinsic circumstances of the case, as found by the Master, were once within the knowledge of the Court, there remained no moral-doubt as to the intention of the testatrix, with respect to the disputed bequest. But, that, surely, was not enough. "In expounding a will, the Court is to ascertain, *not what the testator actually intended*, as contradistinguished from what his words express, *but, what is the meaning of the words he has used*." (Per Parke, J., *vide supra*, pl. 9, note.) The office of extrinsic evidence, in cases of this nature, is not merely to enable the Court to form a plausible or probable conjecture as to what the testator may have intended by the words which he has employed; it is rather, to ascertain whether, when all the facts of the case are known, such words, however inexact and improper, do really, with sufficient legal certainty, apply to and describe the alleged object or subject-matter of the disposition. In this case it is submitted that they did not. The Court had to deal with a specific bequest of a non-existing chattel; and however embarrassing the reflection, that the testatrix must have meant something by her bequest, it seems clear that the words of her will, aided by a full knowledge of the circumstances under which it was written, were inadequate to convey that meaning to a Court of construction, through the strait and jealously-guarded avenues provided by the rules of evidence. It must be recollected that in all cases of actual *mistake*, as distinguished from those of mere *falsa demonstratio*, the Court has no means whatever of ascertaining what the testator would have done, had his attention been drawn to the fact. His motives and intentions, which were always secret, became at his death for ever undiscoverable; and the most plausible hypothesis as to the manner in which he might have rectified his error, is at best mere matter of curiosity and conjecture.

Finally, upon this point the experience of Lord Langdale may be borne in mind. "I have known," said his Lordship, "several cases in which testators have, on the face of their wills, made great gifts with nothing to answer them; and I have heard Lord Eldon say that the easiest method of practising a delusion on others is by the mode of framing a will." *Quennell v. Turner*, 13 Beav. 249.]

in other cases also. They will be so in those cases in which such declarations, according to the general rules of evidence, prove or tend to prove a material fact, collateral to the question of intention;¹ which fact (within the scope of the Propositions stated in the preceding pages) would aid the mere exposition of the testator's words.

[Parol evidence can often be given of a testator's circumstances, habits and manners, though not of his intention, as expressed by him orally at the time of his making his will. This distinction seems strange to many when learning it for the first time. Parol evidence appears to be as great a violation of the statute of frauds, and the other wills acts in the one case as in the other. Besides, it is sometimes not easy to tell when the evidence should fall short of the testator's intention. When parol evidence, like the statute of limitations, or a loquacious advocate, once begins to run, it is not easy to stop it. However, there are certain well-ascertained criteria, attention to which will always inform the practitioner when parol evidence must be confined to the testator's circumstances, and cannot be extended to declarations made by him at the time when he made or dictated the will.²

[This question is much more important than the admissibility of parol evidence at all in aid of the construction. For, in the first place, there is hardly a limitation in a will informally drawn—and of such alone are the reports full—as to which parol evidence cannot be adduced of the testator's circumstances. Much of this evidence too is but slightly relevant in most cases. But, to allow evidence of a direct statement by the testator settles the question at once, and even though the circumstances of the testator would otherwise raise a very strong presumption in the contrary direction. Direct evidence of intention, moreover, alone repeals the wills acts. Evidence of the testator's circumstances is always necessary to apply the dispositions in the will to their appropriate subjects and objects; and even

¹ *Supra*, pl. 104.

² See *Rogers v. Wheeler*, 22 Wendell, 148; *Fish v. Hubbard*, 21 Wendell, 652.

when the testimony is adduced in aid of the construction, it is merely for the purpose of explaining the meaning of the terms, and applying them to their most appropriate subjects and objects, and not, as in the case of evidence of intention, virtually to insert wholly new, though negative, terms in the will.

[With respect to the preliminary question, as to when parol evidence is admissible, it is only necessary to repeat, as has been already frequently urged, that parol evidence is never allowable in aid of the construction, as distinguished from applying the text of the will in the primary sense of its terms, except when such primary signification is insensible, that is to say, when it is inapplicable to the circumstances of the testator. Thus, a devise of freeholds will not be extended to leaseholds, though the testator had one acre only of freehold while he had thousands of acres of leasehold.¹ Neither will the illegitimate children or the stepchildren of A. B. take under a gift to the children of A. B. even though he have no other children at the date of the will. For, he may afterward marry and have lawful children of his own.² But, if the testator, in the first case put, had no freeholds at all, and if, in the second instance, A. B. were dead, leaving only illegitimate children, the primary sense of the terms in the will being inapplicable to the circumstances of the testator, a secondary one would be adopted *ut res magis valeat*.³

[In neither of the instances put, however, could direct evidence of the testator's intention be adduced. This evidence is not allowable to apply an ambiguous or imperfect description, but to discriminate between two or more persons or things, both, or all of whom, or which, equally correspond to the description contained in the will.⁴ For instance, if the testator devise his castle of Fairhill to James Styles, and he has only a castle called Brownhill, and there is only a Charles Styles known to the testator, parol evidence of these facts is admissible in aid or rectification of the construction, but no evidence

¹ Pl. 32, note 2; pl. 67, note 2.

² Fouke v. Kemp, 5 Harr. & Johns. 135.

³ Watkins v. Flora, 8 Ired. 374.

⁴ Wasthoff v. Dracourt, 3 Watts. 243; Grass v. Ross, 5 Sneed. (Tenn.)

can be adduced of the testator's intent. Let us suppose, however, that he has two or more castles called Fairhill, or two or more acquaintances called James Styles, or that, as in the case already put, he had not only a castle called Brownhill, and one acquaintance named Charles Styles, but that he knew two of that christian and surname, parol evidence would then be admissible of his intent.

[It is in cases like the last put, where the description is both imperfect in itself, and is further confused by the fact of suiting two or more subjects or objects, that the distinction between evidence of facts and of intention is usually lost sight of. Such cases usually admit of both kinds of evidence; first, of facts to apply the imperfect description to *any* subject or object, and, secondly, of evidence of intention, to discriminate between two or more subjects or objects, both or all of whom, or which, equally well or equally ill correspond to the description in the will.

[If the description of the person or thing in the will is wholly inapplicable to the subject or object intended, evidence, it is said, is not admissible to show what or whom the testator meant.¹ This is true in the abstract. But, as a matter of fact, it is hardly possible, at the present day, that any reference in a will, no matter how general or symbolic it may be, would not be applied in some way by the Court.² However, until it is applied, in this way, to some person or thing by ordinary parol evidence, not relating to the testator's intention, and until the construction thus applied is found to suit two or more subjects or objects, direct evidence of the testator's intention is inadmissible.³

[Where the description, however, is very imperfect, it is the more likely to suit a great variety of objects either equally well or equally ill. The less definite or particular and the more generic a term is, the greater will be the number of persons or things to which it will extend. Hence it happens that direct evidence of intention is often admissible in cases where, if the description was more accurate, any parol evidence should be confined to the circumstances of the testator.

¹ 1 Jarm. 357, note, Am. ed.; 1 Greenl. on Ev. § 290.

² See *Pritchard v. Hicks*, 1 Paige, 270.

³ *Webb v. Webb*, 7 Monr. 626, 628; *Avery v. Chappel*, 6 Conn. 270.

[In the case of *Grant v. Grant*,¹ a devise to my nephew, I. G., was held to apply to a nephew by affinity. The primary meaning of the term "nephew" comprised, in the opinion of the Court, not only relations by consanguinity, but also by affinity. This ruling, indeed, took the legal world by surprise. For, previously, relatives by affinity were not supposed to be comprised under the terms, "cousins," "nephews," etc. Had the Court not considered the primary meaning of the term to be thus comprehensive, there would be no foundation for parol evidence of any kind, as the testator had a nephew named I. G. The disposition, in its primary signification, was thus sensible and applicable to a certain person. But, owing to the interpretation of the word "nephew" by the Court, the bequest was equally applicable to more persons than one.²

If two or more subjects or objects do not afford a foundation for parol evidence, the description must be inaccurate in some respects, and thus equally applicable or inapplicable to two or more persons or things, before evidence of the testator's intention can be given. Such imperfections of description are frequent enough.³ Consequently, direct evidence of a testator's intention may often thus be indirectly adduced, in the United States though not in England, owing to the imperfections of the statements in the will. However, evidence founded upon the long previous customs and habits of the testator, is much more satisfactory to the Court, and far less likely to be manufactured to order than direct evidence of the testator's alleged declarations.⁴

[When evidence of intent is admitted under Proposition Seven, this evidence is merely of a negative nature, being adduced to exclude, not to include, some alleged subject or object. Negative testimony of this character has been held not to fall within the purview of the wills acts.⁵

¹ 39 L. J. N. S. 272.

² See *Cromer v. Pinckney*, 3 Barb. ch. 466.

³ See *Doe d. Chevalier v. Huthwaite*, 3 Moore, 304; 3 B. & Ald. 632.

⁴ See *Trustees v. Peaslee*, 15 N. H. 317; *Domestic and Foreign Missionary Society's Appeal*, 30 Penn. St. 425.

⁵ See *infra*, p.

[Misdescriptions of a subject or object are not necessarily cases of latent ambiguity, but may be merely instances of false demonstration, or involve a context, which are to be decided on general principles of construction, and not by aid of parol evidence.¹ Even when parol evidence is admissible, it may not be lawful to give evidence of the testator's intention, but only of his circumstances. Proposition Seven shows that the parol evidence can only extend to the testator's oral declaration or intention, when there is an equivocation, and not an ordinary latent ambiguity arising from misdescription.

[Where part of the description of the donee applies to one person, and part to another, parol evidence of intention is not always admissible to show which was intended.² Jarman,³ however, considers that such cases are not distinguishable from the ordinary case of a devise to A., there being two A.'s.⁴ This statement, however, is too wide. There appear to be several obvious grounds of distinction between the two classes of cases; inasmuch as the ambiguity of the former is as often remedied by construction as by parol. It is frequently founded on what is in the will, as well as on what is outside it. The will, let us suppose, contains a false demonstration. Now, false demonstration is not removable by parol in the same way in which a latent ambiguity is. For this can be explained by parol evidence of intent; whereas, the former is a difficulty merely of construction, and can only be explained by evidence of the testator's circumstances, but not of his intent. It is insensible as to external circumstances. It does not fit the state of facts. But, where the description suits more than one donee, the text of the will is perfect, and the ambiguity is wholly raised by parol.

[Jarman's position is only true, if the inaccurate statement *equally* suits two or more persons or things. If this is the case, and the equivocal description is equally applicable to each claimant, parol evidence of the testator's intention is clearly admissible in point of principle, though this rule does not obtain in England;⁴ but it does in America. If the defect be a partial

¹ Per Tindal, Ch. J., in *Miller v. Travers*, 8 Bing. 244; see *Goode v. Goode*, 22 Mo.; *Doe d. v. Westlake*, 4 B. & Ald. 57.

² *Hiscocks v. Hiscocks*, *infra*, pl. 183.

³ 1 Jarman, 376.

⁴ *Hiscocks v. Hiscocks*, 5 M. & W. 363.

blank, or a description, *prima facie*, not applicable to any person or thing,¹ yet, if there is in the will a sufficient legal description of two or more persons or things, parol evidence of intent is admissible. If the description is partly applicable to each of two or more persons or things, without being strictly equivocal or equally descriptive of them; if, in other words, part of the description applies to one, and part to the other, and the case can still not be disposed of under a rule of construction, the leading case of *Hiscocks v. Hiscocks*,² decides that parol evidence of the testator's circumstances, but not of his intention, is admissible in England.³ But, if the description is as applicable to one claimant as to another, the ambiguity seems then necessarily to fall under Proposition Seven. For either the description equally suits two or more persons or things, or it suits one of them more than the other. In the latter contingency, the case is one for construction after the adduction of parol evidence of the testator's circumstances.⁴ But, if the description, while inaccurate as to both subjects or objects, is equally applicable to either, though for different reasons, the case seems to fall essentially under Proposition Seven, and to admit of evidence of the testator's intent.

[In *Thomas v. Moore*,⁵ the Judges seemed to consider that parol evidence of intent would, in such cases, be admissible. In almost all of the United States, the evidence is received.⁶

[The case of *ex-parte Hornby* seems to be founded on sound principles. For, where the description in the will, though inaccurate, is not suffered to be void for uncertainty, but is allowed to be aided by parol evidence, there is no ground for limiting the parol evidence to the testator's circumstances, and not extending it to his intention, if the description, though inaccurate, *equally* suits both subjects or objects. It is rarely, indeed, that the description will not suit one more than the other or others. But, if it is equally applicable to all, parol evidence of intent would seem to be properly admitted. Such evidence, however,

¹ *Price v. Page*, 4 Ves. 680; *Sill v. Hoste*, 6 Madd. 192.

² 5 M. & W. 363.

³ *Cass v. Ross*, 3 Sneed, 211.

⁴ See *Tucker v. Seamen's Aid Soc.* 7 Met. 188; *id.* 209.

⁵ 6 T. R. 671.

⁶ See *ex-parte Hornby v. Ward*, 2 Bradf. Sur. 420.

would at present be admitted in the most of the United States, no matter whether all claimants were equally well or ill specified or not in the will. In some of the States, indeed, the rule in *Hiscocks v. Hiscocks*¹ is strictly followed, and parol evidence is not admitted, in such cases, of the testator's intent.² In most of the States, however, many questions which in England would be determined by construction, will be aided by parol, while similar evidence will also be allowed, even of the testator's intent.³ This nebulous state of the law, however, is rapidly passing away. Hence arises the great value of Sir James Wigram's work, since to that complexion all adjudications will come at last, except so far as he himself has deviated from the bounds of strict philosophy. Certainly, there appears to be no essential distinction between latent ambiguities and defective or inaccurate descriptions. Both classes of difficulties are essentially equivocations, when the question can not be disposed of under a rule of construction. This is, perhaps, the only phase of present American latitudinarianism, which is likely to prevail ultimately as the standard.

[The evidence of the scrivener who drew the will is not admissible for any purpose of construction whatever,⁴ except in the case of a latent ambiguity arising either from fact or law.⁵ The cases of *Nolan v. Bolton*⁶ and *Lorieux v. Keller*,⁷ can hardly be supposed to have much shaken so radical a rule of construction as the inadmissibility of evidence of the testator's intention, except in cases falling under Proposition Seven.

[Where words have a well known and unambiguous signification, parol evidence of the testator's intention is not more admissible in the United States than in England.⁸ Therefore, the meaning of the words "children,"⁹ "parent,"¹⁰ &c., cannot be extended by parol.¹¹

¹ Pl. 183.

² See *Herrick v. Noble*, 27 Vt. 1.

³ *Wagner's App.* 43 Penn. St. 102.

⁴ *Canfield v. Bostwick*, 21 Conn. 550.

⁵ *McAllister v. Tate*, 11 Rich. Law. 509.

⁶ 25 Ga. 352.

⁷ 5 Clarke, 196.

⁸ *Aspden's Estate*, 2 Wallace, Jr. 368.

⁹ *Shearman v. Angel*, Bailey, Ch. 351; *Fouke v. Kemp*, 5 Harr. & J. 135.

¹⁰ *Judy v. Williams*, 2 Carter, 449.

¹¹ *Smith v. Smith*, 1 Edw. Ch. 189; see *Grant v. Grant*, 18 W. R. 20.

[The declarations of a testator are admissible only in cases falling under Proposition Seven, and for no other purpose, either as regards the application or the construction of the will.¹ But, where the issue is *devisavit vel non*, and the question is whether the will or passage in contention is the will of the testator or not, his declarations are always admissible as to that fact, though not as to the construction. In cases of alleged fraud, therefore, where there is generally no question as to the construction, but only whether the will propounded is the act and will of the testator, his declarations are admissible either to establish the charge of fraud,² or to refute it³ as explained *infra*. But, though admissible for this purpose, the extrinsic evidence cannot be afterwards used in aid of the construction, although it is a tolerably general rule of evidence, that testimony once admissible is then available for every purpose. Upon this ground, as parol evidence is allowable to rebut the charge of a criminal offence, such as trespass, the fact of taking possession of land under a contract, may be proved by parol, in aid of a suit for specific performance.

[As regards latent ambiguities, parol evidence is, as in a case of fraud, admissible of the testator's declarations, whether made before or after the execution of the will.⁴ This rule, however, seems to have been ignored in some of the American cases, apparently on the ground, that such proof is admissible only as evidence of the *res gestæ*.⁵ But it seems to be such, even when *ex post facto*, at least in a case of fraud, undue influence, or latent ambiguity. However, parol evidence of a testator's intentions is only receivable as to what his intentions were at the time of making the will.⁶

[Declarations made by the testator subsequent to the will are inadmissible to show what he meant by the phrase "nephews

¹ *Osborne v. Varney*, 7 Metcalf, 301; *Farrar v. Ayres*, 5 Pick. 404; *Bradley v. Bradley*, 24 Mo. (3 Jones) 311.

² *Roberts v. Trawick*, 17 Ala. 55; see *Cawthorn v. Haynes*, 24 Mo. (3 Jones) 236.

³ *Roberts v. Trawick*, 17 Ala. 55.

⁴ *Doe d. Allen*, 12 Ad. & Ellis, 451.

⁵ See *Vernor v. Henry*, 3 Watts. 385.

⁶ *Whitaker v. Tatham*, 7 Bing. 628.

and nieces." Indeed, where the phrase is itself unambiguous, the American and English rules are identical with respect to the reception of parol evidence.² See, however, *Grant v. Grant*,³ as to the meaning of the word "nephew." A generic name or a reference to a class, such as "nephews," "children,"⁴ "heirs," can never *per se* give rise to a latent ambiguity, though as in the case of *Grant v. Grant*, such ambiguity may, of course, be occasioned by other parts of the description, as, for instance, by the name of the "nephew," "child," or "heir," referred to.⁵

[The authority of the decision in *Beaumont v. Fell*,⁶ is not weakened by the fact that the Master of the Rolls seemed to consider that if the donation related to land, the gift might be construed differently. As legacies were governed by the rules of the civil and common law originally, he thought this fact affected the construction, even after the passing of the statute of frauds. The case of *Forth v. Chapman* and other similar decisions seem to bear out this distinction. The case was probably decided on the ground of the nickname. However, all that the statute of frauds requires to be put in writing is such a will, as before the statute would have been valid without writing. Whatever latitude of designation, therefore, was allowed by the Ecclesiastical Courts, before the statute, ought to be also permitted now. There is, consequently, much reason to regard the *dictum* of the Master of the Rolls, on this point, in *Beaumont v. Fell*, as sound and philosophic, although it is strongly argued against by Jarman.⁷

[The intention of a testator is a fact capable of proof like other facts. Although volition is invisible, yet, as a *malus animus* may be proved in a criminal case by evidence of declarations made by the accused, so may the benevolence of a testator, when manifested by declarations, be proved with equal ease. The Court, however, does not admit evidence of such intention as readily as it will of the circumstances of the testator. Per-

¹ *Cromer v. Pinckney*, 3 Barb. Ch. 466.

² *Weston v. Foster*, 7 Met. 297.

³ 18 W. R. 20; s. c. 39 L. J. N. S. 272.

⁴ *Asay v. Hoover*, 5 Penn. St. 21.

⁵ *Allen v. Allen*, 18 How. U. S. 385.

⁶ 2 P. W. 141.

⁷ Vol. I, 383; see *Thomas v. Stevens*, 4 John. Ch. 607.

jury is not so easy in instances of this latter character. The logic of facts, or circumstantial evidence, is itself a barrier against the sorting of the facts to order, and the reason for the origin of the rule which confines parol evidence of intent to cases under Proposition Seven, is to be found in the fact that, besides involving a departure from all construction, the necessity for admitting parol is discovered only in applying the dispositions in the will to the circumstances of the testator, and that his intention would be the last thing that could come to be mixed up in such application.

[Where parol evidence of the testator's declarations is admissible, it seems, as already stated, immaterial whether the declarations are prior, contemporaneous with or subsequent, to the making of the will,¹ provided that they relate to the intention he had at the time of making the will. Possibly, a subsequent declaration might not be deemed to have the same weight, as if it had been made at the time of making the will. But, the admissibility of evidence is a distinct question from its weight.

[The case of *Careless v. Careless*,² is a model case of ambiguity, and seems like the old fictitious issues of *Goodtitle v. Badtitle*, to have been bespoken for the purpose of showing in what a degree of carelessness some testator's indulge. They may be likened to persons who enclose money in undirected envelopes. The identification of the donee is virtually left wholly to parol. In the case last referred to, the bequest was "to Robert Careless, my nephew, the son of Joseph Careless." The testator had no brother named Joseph, but had two nephews, each named Robert Careless. One of these was the son of John, the other of Robert. In certain parts of the will Robert was described as the son of John, and sometimes as the testator's nephew, Robert, without further description. The testator was intimately acquainted with John's son Robert, but his other nephew lived at a distance, and was personally unknown to him. It was doubtful even whether the testator knew that such a person existed. Sir W. Grant admitted parol evidence to explain the latent ambiguity, and held that the testator in-

¹ *Doe d. Allen v. Allen*, 4 Jurist, 985.

² 1 Mer. 384; See *Stokeley v. Gordon*, 8 Md. 496.

tended throughout the will to refer to that nephew only, whom he best knew. The insertion of the new word Joseph, however, would seem to be accounted for more easily by supposing that the testator meant a different person from John. If no other brother was referred to, there is less likelihood that the drawer of the will would have slipped in respect to the name. Besides, it is more likely that the testator would have bequeathed something to the family of his brother Thomas, than have left all to one branch only. However, the parol testimony, doubtless, overthrew these presumptions and conjectures. There is no doubt, at all events, that the parol evidence was rightly admitted.

[In Lord Cheney's case,¹ it was resolved that if a man have two sons, both baptized by the name of John, and believing that the elder died, devise his lands to his son John generally, upon the return of the elder son, the younger may prove that it was he himself whom his father intended to designate. The effect of this doctrine is to put a person purchasing from a devisee, upon enquiring whether there is not some other person of the same name whom the testator may have intended. But a difficulty in this respect rarely occurs, especially as devises are generally confined to relatives or persons standing in a peculiar relation to the testator. A difficulty of the kind suggested may of course occur, even where the person in possession claims as purchaser. But, as he usually has the title deeds in his possession, and innumerable other evidences of the *res gestæ* and of his identity, the latent ambiguity is immediately corrected.

[The reason assigned by Coke for the doctrine in Lord Cheney's Case is, that no inconvenience can arise in such instances of ambiguity, "because he who sees such will, ought at his peril to enquire which John the testator intended, which may be easily known to him who wrote the will, and others who were privy to his intent." It is hardly necessary to add, that the reason ascribed for the rule by Lord Coke would apply to every case of ambiguous expression in a will. The true reason for admitting direct evidence of the testator's intent in such case is, the paramount necessity of such testimony to apply the devise.

¹ 5 Rep. 68 b.

[In the case of *Doe d. Morgan v. Morgan*,¹ a testator devised certain property to his nephew, Morgan Morgan, and then in the same will, devised other property to his nephew, Morgan Morgan, *of the village of Mothvey*. The testator had two nephews, one of whom lived at Mothvey, and the other elsewhere. It was contended that the difference in the description between Morgan Morgan, simply, and Morgan Morgan, of the village of Mothvey, pointed to two different persons, and that parol evidence was inadmissible. The Court, however, appears to have regarded the phrase, in the village of Mothvey, as so much surplusage, and admitted parol evidence of the intent. The case let in evidence of intent where it was not absolutely necessary, and this, indeed, seems not to harmonize wholly with principle. The distinctness of the devises, and the difference in the description of the devisees, would seem to indicate that the testator meant different persons. This case would seem to imply that when the name of the donee is applicable to more persons than one, parol evidence of intent is admissible.² But this rule is not yet established, and parol evidence of intent would doubtless be rejected, where any distinctive mark is added to the name, as in *Doe d. Westlake v. Westlake*.³

[In cases falling under Proposition Seven, the description of the person or thing intended, is applicable with legal certainty to each of several subjects.⁴ Unless it is so applicable to more than one, there cannot be evidence given of the testator's intention. Any incompleteness of description can only be cured by parol evidence of the circumstances of the testator, but not of his intention. If the description is applicable with legal certainty, evidence of intent can be given in the United States, but *semble* not in England, as a rule, unless the description is *equally* applicable to two or more persons or things.

[There are certain clear lines of principle dividing Proposition Seven from Proposition Three. Where there is a difficulty in applying the description of the will to *any* subject or object,

¹ 1 Crompt. & M. 235.

² *Tucker v. Seamen's Aid Society*, 7 Metcalf, 208, 209.

³ 4 B. & Ald. 57.

⁴ 1 Phil. Ev. 532; note, 939; 1 Greenl. Ev. § 290; *Grass v. Ross*, 5 Sneed, (Tenn.) 211.

Proposition Three applies, and evidence can be given only of the circumstances of the testator, but not of his intention; but, where there is no difficulty in applying the description in the will to a single subject or object, but the conflict is between several subjects or objects, all equally appropriate as regards the legal construction, Proposition Seven applies, and evidence of intention can be given.

[Necessity is the plea for departing from the primary meaning of a term or phrase.¹ Necessity, in like manner, is the reason why extrinsic evidence is resorted to. We find accordingly, that, when the necessity of the case (in the abstract), requires it, even parol evidence may be given of the testator's direct intention. For instance, if he devises his lands of Auburn, to Oliver Goldsmith, and he has two estates of the name of Auburn, or two acquaintances named Oliver Goldsmith,² the devise may necessarily be void for uncertainty, unless parol evidence is admitted to identify the particular subject or object of the gift. What is peculiar to this class of ambiguities is, that the parol evidence tendered in aid of the construction need not be confined to facts, or to the acts of the testator, but may directly relate to his intention, and prove the same by expressions used by him.

¹ See Proposition I.

² *Storer v. Freeman*, 6 Mass. 440; *Hand v. Hoffman*, 3 Halst. 78.

OF LATENT AND PATENT AMBIGUITIES.

196. THE rule of law, an elucidation of which has been attempted in the preceding pages, is commonly expressed by Lord Bacon's well-known maxim (*Regula* 23), "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*"

197. Upon this maxim, Lord Bacon observes:—

"There be two sorts of ambiguities of words: the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain, and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity.

"*Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed.

"Therefore, if a man give land to J. D. *et* J. S. *et* *hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited.

“So, if a man give land in tail, though it be by will, the remainder in tail, and add a *proviso* in this manner: Provided, that if he, or they, or any of them, do any, etc., according to the usual clauses of perpetuities, it cannot be averred upon the ambiguities of the reference of this clause, that the intent of the devisor was, that the restraint should go only to him in the remainder, and the heirs of his body; and that the tenant in tail in possession was meant to be at large.

“Of these, infinite cases might be put, for it holdeth generally, that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election, but never by averment, but rather shall make the deed void for uncertainty.

“But if it be *ambiguitas latens*, then otherwise it is: as, if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all; but if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact; and, therefore, it shall be holpen by averment, whether of them was that the party intended should pass.

“So, if I set forth my land by quantity, then it shall be supplied by election, and not averment.

“As, if I grant ten acres of wood in Sale, where I have a hundred acres, whether I say it in my deed or no, that I grant out of my hundred acres, yet here shall be an election in the grantee, which ten he will take.

“And the reason is plain, for the presumption of the law is, where the thing is only nominated by quantity, that the parties had indifferent intentions which should be taken, and there being no cause to help the uncertainty by intention, it shall be holpen by election.

"But in the former case the difference holdeth, where it is expressed, and where not; for if I recite, whereas I am seized of the manor of North S. and South S., I lease unto you *unum manerium de S.*—there it is clearly an election. So, if I recite, where I have two tenements in St. Dunstan's, I lease unto you *unum tenementum*,—there it is an election, not averment of intention, except the intent were of an election, which may be specially averred.

"Another sort of *ambiguitas latens*¹ is correlative unto these; for this ambiguity spoken of before is when one name and appellation doth denominate divers things; and the second, when the same thing is called by divers names.

"As, if I give lands to Christ Church in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford*, this shall be holpen by averment, because there appears no ambiguity in the words; for this variance is a matter in fact: but the averment shall not be of intention, because it doth stand with the words.

"For, in the case of equivocation, the general intent includes both the special, and therefore stands with the words: but so it is not in variance, and therefore the averment must be of matters that do endure quantity, and not intention.

"As to say, of the precinct of Oxford, and of the University of Oxford, is one and the same, and not to say that the intention of the parties was, that the grant

¹ Can the word "ambiguity," as used in this place, be understood—in its proper sense—as importing *uncertainty*? What uncertainty can arise from the omission of an *alias*, provided the subject is called by one of its proper names? "Ambiguous—Doubtful; having two meanings; of uncertain signification."—*Johnson*.

should be to Christ Church in that University of Oxford."

198. The only point which remains to be considered is,—How far the Propositions stated above are consistent with Lord Bacon's Maxims.

199. The attention of the reader must, in this place, be recalled to the proper meaning of the term *ambiguity*, as applied to the subject of these observations.¹

200. A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only, if found to be of uncertain meaning when persons of competent skill and information are unable to do so.

201. Words cannot be ambiguous, because they are unintelligible to a man who cannot read; nor can they be ambiguous, merely because the Court which is called upon to explain them may be ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow—that the question, whether a will is ambiguous, might be dependent, not upon the propriety of the language the testator has used, but upon the degree of knowledge, general or even local, which a particular Judge might happen to possess; nay, the technical precision and accuracy of a scientific man might occasion his intestacy,—a proposition too absurd for an argument. It follows, therefore, that a Judge is not in a situation to say whether a testator's will is ambiguous or not until he has first applied to it the extrinsic evidence to which the Fourth Proposition² refers.

202. Again, a distinction before adverted to,³ but

¹ *Supra*, pl. 96.

² *Supra*, pl. 56,

³ *Supra*, pl. 96.

not noticed in any of the reported cases, must be taken between *inaccuracy* and *ambiguity* of language.

203. Language may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate. If, for instance, a testator having one *leasehold* house in a given place, and no other house, were to devise his *freehold* house there to A. B., the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker, of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient merely by the rejection of words of surplusage are cases in which no ambiguity really exists. The meaning is certain, notwithstanding the inaccuracy of the testator's language. A Judge in such cases may hesitate long before he comes to a conclusion; but if he is able to come to a conclusion *at last*, with no other assistance than the light derived from a knowledge of those circumstances to which the words of the will expressly or tacitly refer, he does in effect declare, that the words have a legal certainty,—a declaration which of course excludes the existence of any ambiguity. The language may be inaccurate; but if the Court can determine the meaning of this inaccurate language, without any other guide than a knowledge of the simple facts, upon which—from the very nature of language in general—its meaning depends, the language, though inaccurate, cannot be ambiguous. *It follows that, in all cases, the application of the extrinsic evidence, to which the Fifth Proposition refers, must precede any*

*declaration which a Court can have a right to make that a will is ambiguous.*¹

204. The circumstance, that the inaccuracy is apparent upon the face of the instrument, cannot, in principle, alter the case.

205. With the distinctions just adverted to in his mind, the reader will have no difficulty in following the writer through the few remaining observations on the subject of latent and patent ambiguities.

206. It has been shown, in the preceding pages, that evidence of two descriptions has, under circumstances, been held admissible in aid of the exposition of wills, namely: 1. Explanatory evidence, consisting of evidence of collateral facts and circumstance only. 2. Evidence to prove intention as an independent fact.²

207. Now, courts of law, in admitting evidence of the first description, have professed to save whole Lord Bacon's rule, and must, therefore, have considered that the admission of such evidence was consistent with the rule. There is no reason for questioning the soundness of the judgment which led to such a conclusion. The strictest interpretation of which the rule is capable cannot be stated higher than this,—that courts of law, in expounding a written instrument, are precluded from giving to the instrument any effect which it does not express; and if it be conceded that the admission of evidence of the first description is strictly consistent with the office of simply ascertaining what the instrument itself expresses, Lord Bacon's rule is untouched by admitting it. Indeed, it is deserving of consideration, whether the language of the rule does not tacitly concede the admissibility of such evidence. Lord Bacon, in his concluding paragraphs, expressly points at the

¹ *Supra*, pl. 96.

² *Supra*, pl. 10.

distinction between evidence of matters collateral to the intention, and evidence of the intention itself; and the maxim, in speaking of ambiguities which arise "*ex facto*," necessarily supposes the language of the will, and the facts with reference to which it was written, to have been collated together. It is the incongruity or want of correspondence between the language and the facts which raises a *latent* ambiguity, in the common acceptance of the term.

208. It may be asked, however, whether the rule is not violated, when evidence of the first kind is admitted in aid of a description which, *upon the face of the will*, is inaccurate or imperfect? With confidence it is answered—No. The inaccuracy of the testator's language in such cases is undoubtedly *patent*; but as the meaning of inaccurate language *may* be unambiguous, it is impossible to predicate of a will in such cases, or in any case, that it is ambiguous, until the effect of bringing the language into contact with the facts to which it refers shall first have been tried. See the case of *Goblet v. Beechey*.¹ The word "mod," as used by Nollekens, in the 11th codicil to his will, was a patent inaccuracy; but the court, upon further directions—with no guide to the testator's intention but his words, and the knowledge which is common to every working sculptor in the country—decided that the testator's models were sufficiently described by the word,—a decision which negatived the existence of any ambiguity whatever.² The reversal of the Vice-Chancellor's judgment in that case does not affect this point.

209. To what class of cases, then, does Lord Bacon refer, in speaking of patent ambiguities? Let his own commentary upon the rule answer for him. The exam-

¹ Appendix, No. 1.

² *Supra*, pl. 96.

ples by which he illustrates that part of the rule which relates to patent ambiguities, are not cases of misdescription of the object of the testator's bounty, or of the subjects of disposition, but cases in which (the persons and things being sufficiently described) the testator's general intention with respect to them is ambiguously expressed.¹ Such cases are within the Sixth Proposition above stated, and are not saved by the exceptions contained in the Seventh Proposition. A devise to one of the sons of A., who hath several sons, is a case within the same principle.² No person in particular is *intended* by the will.

210. So far the maxim and the authorities referred to in the preceding pages appear to stand together. But what is there in the maxim which ever authorized the admission of evidence of intention where the language of the will was wholly inapplicable, or of uncertain application, to any subject? In the first place, can such a will be properly termed ambiguous? An instrument, the words of which are sensible in more senses than one, is properly speaking, an *ambiguous* instrument. But an instrument which points at no certain intention is (in the language of the courts) *insensible*, and not merely ambiguous. Admitting, however, that such a will as we are now supposing is an ambiguous will within the meaning of the maxim, the question whether the maxim authorizes its admission in such cases will still recur. The words of the maxim are, undoubtedly, very general; but the examples by which it is illustrated are not so. The examples given by Lord Bacon,

¹ The points of inquiry under a will may, for general purposes, be classed under three heads:—1. The person intended. 2. The thing intended. And, 3. The intention of the testator with respect to each of them.

² 2 Vern. 625.

in which evidence to prove intention is said to be admissible to remove or explain a latent ambiguity, are cases in which the language of the will *includes and describes the subject intended* by the testator, and is ambiguous, only because it describes and is equally applicable to *more than one subject*. It may admit of argument, whether the commentary on the maxim does not justify the admission of evidence to prove intention even in such cases upon that specific ground. The observation—"For, in the case of equivocation, the general intent includes both the special, *and therefore stands with the words, but so it is not in variance*"—may, without violence to the language of the commentary, be considered as applicable to all the cases of latent ambiguity, which are put in illustration of the maxim.¹ Can the practice, then, of admitting evidence of intention in cases in which the description of the person or thing is inapplicable, or of uncertain application, to any subject, be considered a sound exposition of Lord Bacon's rule, seeing that the practice has carried the force of his general expressions—beyond the examples by which he has illustrated his meaning—to cases not in the same predicament? The decisions in *Miller v. Travers* on appeal, and in *Hiscocks v. Hiscocks*, have, it is hoped, set this important point at rest.

[Equities may relate either to the whole will, or be merely presumptions of construction applicable to certain dispositions only. To the first class belong cases of fraud, accident, and mistake; to the second, presumptions against the letter of a particular gift, such as that against cumulative legacies, double portions, &c. Equities founded upon accident or mistake, as distinguished from fraud, can, as already stated,² only lead to the nullification of a will, or a part thereof, but not to its amendment. This is a characteristic distinction between such

¹ See *Hiscocks v. Hiscocks*, *supra*, pl. 183.

² *Supra*, p. 47.

equities under a will, and similar equities arising under a contract. In the latter instances, courts of equity will give relief in respect to accident and mistake, at least, as willingly as in respect to fraud, which must be very conclusively proved.

[The construction of a will is, with the exceptions mentioned, the same both at law and in equity,¹ except as regards executory trusts. These will be construed differently in equity, or rather they will be enforced in that court so as to give the precise legal interest to each beneficiary that was intended by the testator. As far as mistakes in wills are remedied in equity, they stand on the same footing there as at law. If they are apparent on the face of the will, they are not mistakes properly so called, but cases of involved construction.² Such errors will be construed at law precisely in the same way as in equity.

[A mistake, however, must be distinguished from an uncertainty. For, if this is patent on the face of the will, the disposition is so far void. But, as is shown in the chapter in the supplementary treatise, on Void Testamentary Gifts, it is not every gift appearing to be uncertain, that is really such. Equity, too, will correct a mistake of diction, apparent on the face of the will, as this is rather the adoption of a rule of construction, than the admission of parol, since the same evidence is not allowed in case the mistake is *dehors* the document. But, a substantial ambiguity patent on the face of the will cannot be explained by parol evidence of the testator's intention,⁴ and is not aided by construction.

[As to what is sufficient evidence that an omission to provide by will for the grandchildren of a testatrix was intentional, under the Massachusetts' statute of 1862, see *Loring v. Marsh*.⁵

[The grounds, then, on which parol evidence is admissible in aid of testamentary interpretation, are, as already shown, identification, fraud, and the rebutting of a legal presumption.

¹ *Supra*, p. 46.

² *Mann v. Mann*, 1 Johns. Ch. 231; s. c. 14 Johns. 1.

³ 1 St. Eq. Jur. § 169-183; *Rothmaler v. Myers*, 4 Desaus, 215; *Arthur v. Arthur*, 10 Barbour, 9.

⁴ *Hyatt v. Pugsley*, 23 Barbour, N. Y. 285.

⁵ 6 Wall. 337; s. c. 2 Cliff. 469.

The evidence, however, is also admitted in cases of accident and mistake, to delete the will or any part thereof, but not to add to it, or explain it in any manner.

[The reason why accident or mistake is not rectified in respect of wills, appears to be because the testamentary beneficiaries have no equity against the heir, and not because the statute of frauds is more directly operative in the case of a will, than it is in regard to contracts, within the statutory purview. A will, however, or any part thereof, executed by mistake, is as easily overthrown as any other instrument similarly executed. For, the statutes merely provide that certain nuncupative and informal wills shall not be valid, but do not enact that every will *prima facie* validly executed is really the will of the testator. In the case of *Comstock v. Hadlyme*,¹ Williams, J., observes, that "if courts of chancery cannot admit such evidence to prove a mistake which they might correct, courts of law cannot admit it to prove a mistake to set aside the will." The primary reason, however, why equity rejects the evidence in question is, because there is no equity to be enforced, even where the mistake can be proved. The evidence is thus inadmissible if tendered to prove an omission, *Æquitas nihil agit frustra*. But, on an issue *devisavit vel non*, evidence of mistake is admissible to show that the written will, or any part thereof, was executed by accident or mistake. These are questions, however, of probate rather than of construction.

[Another obvious reason why equity refuses to amend wills, like other documents, on the ground of mistake or accident, is, that the party to be charged is in all cases dead, and cannot be examined upon, or tender, interrogatories, like a party to a contract *inter vivos*. The Court of Chancery, therefore, has not the ordinary means for rectifying wills. Her proceeding would be virtually *ex parte*, if she set no limits to the adduction of parol evidence in aid of testamentary construction. Besides, beneficiaries under wills are volunteers, and equity never aids a volunteer, except in cases of fraud, which implies a consideration moving from the testator. Unless there be such consideration, fraud or undue influence will not be relieved against. There is no case to the effect that, where a testator has been in-

¹ 8 Conn. 254.

duced by fraud or undue influence not to make a certain will, the court will deem such a will to be made, though the party acting fraudulently has not benefited in any way by reason of his deceit.

[In cases under deeds, a mistake or imperfection in the description of the parcels may be proved in equity by acts or admissions of the party sought to be charged,¹ if the plaintiff have partly performed the contract; and, if the description in the deed to a plot on record identify the lots, this is sufficient, even though the record is irregular.² The last case cited is equally applicable to wills, as regards extrinsic evidence; so are all cases respecting contracts *inter vivos*, if the equity sought to be enforced under a will is maintainable.

[In *Tucker v. The Seamen's Aid Society*,³ the will gave a legacy to "The Seamen's Aid Society in the city of Boston." Another society, called "The Seamen's Friend Society," claimed the gift on the ground of mistake. The latter society offered to prove that the testator had no knowledge of the society named in the will (although proof of a negative is rarely thought of); that he was deeply interested in the welfare of the Seamen's Friend Society, and expressed an intention to give it a legacy, that he directed the scrivener who wrote the will to insert a clause to this effect, but that the scrivener told the testator that the name of the society was the Seamen's Aid Society, to which accordingly the legacy was bequeathed. Parol evidence of the mistake was held to be inadmissible.

[In the case of *The Earl v. The Countess of Newburgh*,⁴ a testator gave directions to his solicitor to prepare a will giving his wife a life interest in his lands in the counties of Gloucester and Suffolk. The draft, however, was submitted to a conveyancer, who struck out the word Gloucester, and the person who made the fair copy of the settled draft changed the word coun-

¹ *Atkinson v. Cummins*, 9 How. 479.

² *Jones v. Johnston*, 18 How. 150.

³ 7 Metcalf, 188. See *Bradley v. Bradley*, 24 Mo. (3 Jones) 311; *Jackson v. Sill*, 11 Johns. 201. See *Chappell v. Avery*, 6 Conn. 34; *Farrer v. Ayres*, 5 Pick. 404; *Cæsar v. Chew*, 7 Gill. & Johns. 127; *Hyatt v. Pugsley*, 23 Barbour (N. Y.) 285; *Harrison v. Morton*, 2 Swan (Tenn.), 461.

⁴ 5 Madd. 364; s. c. 1 M. & Scott, 352; *supra*, p. 221.

ties into county. It was the abstract of the will, and not the will itself, that was read to the testator before execution, so that the mistake remained undiscovered. The vice-chancellor held that even if the omission were proved, the court had no power to correct the will according to the intention, inasmuch as that would amount to a repeal of the statute of frauds in all cases of mistake or accident. It was, on a rehearing, suggested that there was no omission in the will, but that the passage causing the difficulty was written but afterwards struck through with a pen, and then copied into the fair will. An issue, therefore, was asked to try whether this clause was part of the will or not. The judges, on a case submitted to them by the House of Lords, unanimously declared the evidence to be inadmissible. Lord Eldon, *semble*, sent a case to a jury to try whether a similar will was the will of the testator on the point in question.

[In *Comstock v. Hadlyme*,¹ it was contended that an important part of the intended will having been omitted by accident, this rendered the whole will void. But this argument almost implies that a partial intestacy is illegal, though it is not unusual for a testator to adeem, or to make only partial disposition of his property, without any residuary clause. In the case cited, the name of a legatee was inserted, but the amount of the legacy was omitted. Parol evidence, of course, was rejected as to the intended amount. A similar omission occurred in *Chamberlayne v. Chamberlayne*.² But, if there was a limitation by way of remainder or executory interest after, or in defeasance of, such primary gift, the question would be different. The remainder, however, if clearly separable from the primary gift, though defined by it, would be still valid.]

[In the case of *Lord Walpole v. Earl of Cholmondeley*,³ the point at issue would most probably have been construed by the light of parol, if the question related to a deed. In that case the testator made a will in 1752, devising his real estate. In

¹ 8 Conn. 254.

² 4 Ves. 51, 57. See *Salmon v. Stuyvesant*, 16 Wendell, 321; *Whitlock v. Wardlow*, 7 Rich. (S. Car.) 453; the chapter in supplementary treatise on Void Testamentary Gifts.

³ 7 Durn. & East, 138, pl. 121.

1756 he made another will, altering the limitations of his realty in the former will. In neither instrument did he dispose of his personalty, appoint executors, or give directions as to the payment of his debts. In 1776, he desired his attorney to get his will from his steward, in order to add a codicil to it. The steward gave to the attorney the will of 1752. It appears the steward had no other will in his possession. The attorney then drew the codicil, which recited generally that by his last will and testament, dated 25th November, 1752, the testator had devised his real estate to certain uses, but had not charged the same with payment of his debts or legacies, or disposed of his personalty, or appointed executors. He declared this writing to be a codicil to his *said last will*, and revoked the same only so far as it was incompatible with the codicil. He then provided for certain legatees, and for the payment of his debts and funeral expenses, and appointed executors. This codicil was duly executed. Parol evidence was offered to show that when the testator made the will of 1756, he told one of the witnesses that he and his great uncle (to whom the property was limited for life with remainder in strict settlement), had made reciprocal limitations in favor of each other's families, in case of failure of issue of either of them. It appeared also that when he made the codicil of 1776, he expressed no intention of altering the limitations of the real estate further than by subjecting it to his debts, legacies, and funeral expenses. All this evidence was rejected, inasmuch as the codicil by republishing the will of 1752, had revoked the will of 1756. It was contended that the evidence raised a latent ambiguity on the words "last will dated 1752," that the last will was falsely described, and that, therefore, parol evidence should be resorted to in order to show whether the testator used the word last in its technical or its literal sense.

[Lord Kenyon's reasoning on this point is very unsatisfactory. Neither of the instruments, he said, was a will properly so called until the death of the testator; both were ambulatory, and the testator might have set up either. "But," continued his lordship, "supposing Lord Orford had said to the attorney, 'I have two wills in the steward's hands, desire him to send me the last will,' and the steward had by mistake sent him the first, this would have occasioned a latent ambiguity, which

might have been explained by other parol evidence just as parol evidence is admitted to show *quo animo* a will was cancelled, or as in the case of a child destroying a deed." Jarman¹ observes that the acts referred to by Lord Kenyon admit of explanation, and if the revocation had consisted in the steward sending the wrong will, it might also be explained by parol, but that the act of cancellation here was the codicil itself. The distinction is between *res gestæ* and a legal inference of revocation. The latter is not rebuttable, the former is.

[It is somewhat hard to reconcile this case of Lord Walpole *v.* Cholmondeley with the hosts of decisions where a similar latent ambiguity was rectified by parol, or even with the case put by Lord Kenyon of the wrong will being sent by the steward. This, in fact, was a case in which the wrong will was sent, and which is erroneously described as the last will of the testator. Indeed, neither of the two first instruments was the last will of the testator (in the technical sense of the word last), after he made the codicil. The reasoning of Lord Kenyon, therefore, on that point seems weak. The case, however, was one of gross negligence, and hardly deserving the remedial hand of equity. For there was not merely one mistake, but many. It was, on the whole, however, a case fit to be illumined by parol, as the question related to the *res gestæ*. A specific performance was not prayed for against the heir, on the ground that plaintiff's ancestor had made a will as a consideration for the will of 1756 by Lord Orford. Contracts respecting wills, however, may thus be specifically enforced.

[The courts of equity here have sometimes supplied omissions in wills, such as the want of the name of a donee.² But it is doubtful whether any case to this effect is of any real authority.³

[On the whole, it is very doubtful whether any departure from the English rules of testamentary evidence, even though sanctioned by authority, can be deemed solid or secure, except as to the rule in *Hiscocks v. Hiscocks*.⁴ Exceptions to the general rules of evidence are likely, on future reconsideration of

¹ Vol. I, 351.

² *Geer v. Winds*, 4 Desaus. 85.

³ See 1 Redfield, 571; *Abercrombie v. Abercrombie*, 27 Ala. 489.

⁴ Pl. 183; *supra*, p. 225.

the same questions, either here or in England, to be deemed errors on the part of the judges who so decided, rather than as laying down anything new on a definite or sound principle which ought to be permanently retained.

[But parol evidence is admissible to rebut a mere equity, as, for instance, to show that legacies are cumulative, that a portion was not intended to be satisfied by a legacy; or conversely, that the portionment of a legatee was not intended to be an ademption of a testamentary gift,¹ or that land deeded to a devisee was an ademption of a previous devise.² Ademption virtually relates to the *res gestæ* of the will. In all these cases the presumption is disputable, and against the letter of the will. It will be shown presently that where a trust results in equity, by reason and force of the testator's intent as declared in the will, and not in consequence of any adverse rule of equity, parol evidence is inadmissible for or against such inference of interpretation.

[In *Hall v. Hill*,³ Sir Edward Sugden held that as to the fact of advancement, the question was plainly open to parol evidence. So is the intent to advance.

[Lord Eldon admitted parol evidence of a testator's intention to rebut the presumption of the satisfaction of a debt by a legacy.⁴ In *Weall v. Rice*,⁵ Sir J. Leach said that even where the context furnished intrinsic evidence on the point, yet parol evidence of the testator's intention was admissible. But it seems to be wholly contrary to principle to admit of parol evidence against construction, as distinguished from a presumption raised by the court against the words of a will.⁶

[As parol evidence of the discharge of a promissory note is receivable, because it relates to payment and not to the making of the note, so, *pari ratione*, an ademption of a legacy is provable by parol. For, ademption is but a payment in advance, and so far diminishes the assets. Ademption is thus distinguishable from revocation, which directly attacks the devise or

¹ *Livermoe v. Aldrich*, 5 Cush. 431.

² *Thomas v. Capps*, 5 Bush, 273.

³ 1 Dr. & W. 94-111-133.

⁴ *Wallace v. Pomfret*, 11 Ves. 542.

⁵ 2 Russ. & M. 267.

⁶ See *Williams on Ex'ors*, 1173, Am. ed.

bequest as such, without conferring any benefit on the legatee. The Wills' acts apply to revocations, but not to adempments, as regards their relations to parol evidence.

[Evidence of a testator's declarations of intention made at the time of the ademption is admissible as part of the *res gestæ* of the ademption.¹ Roper² thinks that declarations made at any time are admissible, and that those made after the advancement are the most valuable. The evidence is admitted not so much as of part of the *res gestæ*, as of the direct intent to adeem. If such declaration be made after the will, it would show an intent to adeem in the future, if the former ademption was not effectual; and although an intention to revoke is inoperative where there is a statute prescribing ceremonies to the revocation, yet an intention to adeem rests on a different principle when coupled with an act which *per se* is an ademption, and of which parol evidence can be given. However, if made at the time of the transaction, the declarations appear to be strougest; though if made at any time, they are admissible.³

[Sir William Grant, in *Hartopp v. Hartopp*,⁴ as well as Roper,⁵ has expressed his disapprobation of admitting parol evidence of any kind respecting the intention of a testator in giving a legacy, as to whether it was designed to operate as a payment of a debt, or portion, or in substitution of a previous legacy. But, except on the question whether a legacy is cumulative or not, the difficulty arises from matter not documentary. There is, consequently, in point of principle, no objection to admitting parol evidence in such cases.

[Where a will contains a provision for the payment of debts, and a legacy to a creditor, parol evidence is not admissible to show that the testator did not mean by his charge of debts to rebut the equitable presumption that his legacy was a satisfaction of the debt. For the parol evidence in such a case would not be rebutting an implied legal presumption, but would be in the teeth of an express charge. Rules of construction, as

¹ *Dugan v. Hollins*, 4 Md. Ch. Decis. 139; *Swoope's App.* 27 Penn. St. 58; *Kirk v. Eddowes*, 3 Hare, 509.

² Vol. I, 364; see *supra*, p. 234, n. 5.

³ *Wallace v. Pomfret*, 11 Ves. 542.

⁴ 17 Ves. 192.

⁵ 1 Roper on Legacies, 393.

distinguished from legal presumptions, cannot be rebutted by parol.¹

[In *Browne v. Selwin*,² a testator bequeathed the residue to two persons whom he appointed his executors. One of these was indebted to him by bond, and the person who drew the will was ready to prove that the testator directed him, in writing, to insert a clause forgiving the bond, but that the draftsman thought it was unnecessary, as the obligor was to be executor. The House of Lords held this evidence of the mistake to be inadmissible.

[Parol evidence being always admissible to repel an equitable presumption, the claim of an executor, in England, to the undisposed of personalty might be formerly repelled or supported by parol against the claims of the next of kin. This claim of executors has been taken away by Stat. 1 Will. IV, c. 40. It never existed in the United States. Cases, however, under the English rule are in point in respect to our presumptions relating to cumulative legacies and the like. Presumptions thus differ from rules of construction: 1. In being opposed to the letter of the will; and, 2. In admitting of rebuttal or confirmation by parol evidence.

[Parol evidence is admissible to show that a testator placed himself *in loco parentis* in order to raise grounds for the presumption against double portions, &c. The evidence thus adduced virtually relates to the *res gestæ*. It is also connected in principle with the purview of proposition Four, as it tends to explain the epithet "child," as used by the testator.

[The admission of parol evidence to rebut a legal presumption in the case of a will is based on the ordinary law of evidence, which admits of parol to rebut disputable presumptions. The alleged principle of this exception to the general exclusiveness of written evidence is, that the difficulty is raised by parol, and, therefore, may be rebutted by the same weak evidence.³ The alleged principle, indeed, is a mere exemplification of the fallacy *petitio principii*, since every rule of law is

¹ See Hawkins on Wills, p. 300. *Lee v. Pain*, 4 Hare, 251.

² *Cas temp Talbot*, 240. See *Bradley v. Bradley*, 24 Mo. (3 Jones) 311.

³ *Start v. Cannady*, 3 Littell, 399; 4 Kent, 5th ed. 305; 2 Story Eq. Jur. § 1202; *Williams v. Crary*, 4 Wendell, 443.

written in the reports, or had its original theoretically in statutes, of which now as lost only a secondary or parol evidence can be given. As applied to wills, however, there is a special ground for parol to rebut a legal presumption, since the testator is supposed to be ignorant of law, or at least to be *inops consilii*.

[The burden of proof rests on the person claiming against a legal presumption. In the absence of any positive proof either way, the presumption will prevail. This is what is meant by a presumption. Therefore, a person will not get double portions in the absence of any positive evidence to rebut the presumption against his right to both.

[Much error, however, is occasioned by statements in textbooks¹ to the effect that parol evidence is admissible to rebut the presumption of a resulting trust. Parol evidence is, indeed, admissible, as already shown, to rebut or confirm a mere equity arising on matter *dehors* the will, as in the case of double portions, &c., or when the "equity" is against the letter of the instrument, as in the case of cumulative legacies. But parol evidence is never admissible to rebut any resulting trust that is in harmony with the plain construction of the will. Therefore, when a testator devises or bequeaths property to a trustee on certain trusts, any surplus interest that exists after the discharge of the trusts, or by reason of their invalidity, results to the testator's representatives as on an intestacy *pro tanto*; and parol evidence is not admissible to show that such was not the intention of the testator. The question in such cases is, whether the trustee was intended to retain the property, or the balance thereof, for his own benefit. This is a question to be altogether decided on the construction of the document, and not by parol. Any trust that results in such cases to the testator's heirs or next of kin, is not an "equity" at all. It is the old beneficial interest owned by the testator, and which he never intended to convey to the trustee. He has a mere legal estate in any property or part thereof not required for the purposes of the trust. At all events, the question whether he has

¹ 1 Jarman, 357. See *Jones v. McKee*, 3 Barr. (Penn.) 496; *Powell v. Manson & Brimf Manuf. Co.* 3 Mason, 362; *Buck v. Pike*, 2 Fairf. 1.

or not is one wholly of construction, and not for parol evidence. The resulting trust in these cases is in accordance with the letter of the will, and with the rule which tends to cut down the estate of a testamentary trustee to the purposes and limits of the trusts.¹

[Rules of construction are easily distinguishable from presumptions of equity, inasmuch as the former are always in accordance with the express terms of the will; the latter are always against the letter of the instrument. A presumption of equity means one that is not grammatical, or in harmony with the ordinary acceptation of the phrase in question.²

[Where the legal presumption, then, is according to the words of the will, parol evidence is not admissible; but where the presumption either arises from matter *dehors* the will, or is against the words of the instrument, parol evidence is admissible. If the legacy is last in the order of time, as, if it is alleged to be a satisfaction of a debt or stipulated portion, parol testimony is not so freely admitted. There seems, however, to be no ground for rejecting parol evidence in any of these cases. The legacy is a form of payment, and evidence must be admissible to show that the testator did not intend to pay twice, and so to diminish the assets. It is the matter of payment and its relations to the assets, like the ademption of a specific legacy, that constitute the true ground for the admission of parol evidence in such cases,³ and not any ambiguity in the will. For, if all the acts are testamentary, parol evidence is not admissible.

[It is to be remembered, then, that though parol evidence is admissible to rebut or confirm "equities," against the letter of a will, or to show which of several testamentary guardians was meant by the testator;⁴ yet such evidence is not admissible to rebut the presumption of a resulting trust.

¹ See Lewin on Trustees, p. 181 *et seq.* See also chapters in supplementary treatise on "Gifts to Trustees" and "Conversion."

² See *Gladding v. Yapp*, 5 Madd. 59.

³ See *Duckworth's Ex'rs v. Butler*, 31 Ala. 164.

⁴ *Anon.* 2 Ves. Sen. 56; *contra*, *Storke v. Storke*, 3 P. Wms. 51; 2 Eq. Abr. 418, pl. 13.

[Chancellor Kent in *Mann v. Mann*,¹ expressed an opinion to the contrary. Resulting trusts, however, are excepted out of the statute of frauds, but are neither included in nor excepted out of the statutes of wills. Parol evidence surely ought not be admissible to show that a trustee, for an illegal or vain object, is to hold to his own use upon failure of the only specified trust. This would be to create a trust of land without a writing. In the case supposed, the devisee is a trustee for the representatives of the testator, by force of the limited expressions in the will and the exception of resulting trusts in the statute of frauds. Parol evidence seems to be, both on principle and authority, wholly inadmissible in such cases.²

[Parol evidence is not admissible to rebut a conclusive or statutory presumption, as, for instance, where statute law provides that a will shall speak from a certain period, unless the context manifest an intention to the contrary.³ As regards legal presumptions, in short, parol evidence is admissible only in respect to a presumption or rule of law raised *contrary* to the letter of the document. Equity raises no such contrary presumption in the case of a statutory or a resulting trust.

[Extrinsic evidence is never admissible to rebut the presumption of a lapse. That is always a question of construction on the written evidence, and proof of the death of the beneficiary. This latter testimony is extrinsic, but it is not in aid of the construction.]

¹ 1 Johns. Ch. 231.

² See *Langham v. Sanford*, 2 Mer. 17; *Leake v. Randall*, 1 Vin. Abr. 188; G—a. pl. 3; 2 Br. C. C. 527; *Lewin on Trusts*, p. 181.

³ *Canfield v. Bostwick*, 21 Conn. 550.

GENERAL CONCLUSIONS.

211. THE conclusions, then, which the preceding pages appear to authorize, are these:

212. I. That evidence of material facts is, in all cases, admissible in aid of the exposition of a will.

[Parol evidence is not admissible to show what directions were given by the testator in regard to drawing the will,¹ nor to supply any defect or omission in the will caused by mistake or inadvertence,² though even this has been sometimes done in the United States.³ But parol evidence is always admissible to prove the insertion of a passage not dictated by the testator. Such a part of the document is clearly no part of the will, and therefore is not governed by testamentary law.⁴

[As to mistakes by a scrivener, see *Casar v. Chew*.⁵ As to the difference, so far as parol evidence is concerned, between mistakes in a will required by the statute to be in writing, and those in a will written voluntarily, and not by reason of a statute, see *Andress v. Weller*,⁶ and *Fawcett v. Jones*.⁷

[In *Hippesley v. Homer*,⁸ a testator, by a will dated 1800, devised his estate in a certain manner. By a codicil, made in 1804, he empowered one of the devisees for life to jointure and portion; and after making various changes in the limitations

¹ *Brown v. Selwyn*, Cas temp Talbot, 240; s. c. H. L. 3 Br. P. C. 607.

² *Harrison v. Morton*, 2 Swan, Tenn. 461; *Earl of Newburgh v. Newburgh*, 5 Mad. 364.

³ *Geer v. Winds*, 4 Desaus, 85; *Abercrombie v. Abercrombie*, 27 Ala. 489.

⁴ *Hippesley v. Homer*, Turn. & Russ, 48, note; *Downehall v. Catesby*, Moore, 356.

⁵ 7 Gill & J. 127; *Iddings v. Iddings*, 7 S. & Rawle, 111.

⁶ 2 Green Ch. 604.

⁷ 3 Phillim, 434.

⁸ Turn & R. 48, n.

of the will, he gave certain additional powers of management to his trustees. The bill averred that the testator thought that the codicil contained only powers to jointure and portion, and prayed that it might be set aside. The answer admitted the allegations in the bill. Two issues were directed: first, whether the testator conferred the powers to jointure and portion; and, secondly, whether he devised in the manner described in the remainder of the codicil. The jury found in favor of the first issue, and against the second. The court then declared that this latter part of the codicil was void. This ruling is founded on the principle that an execution of a document as a will or codicil does not make it necessarily valid.

[It is quite immaterial, as regards the admission of parol evidence, whether the insertion of the passage in question was caused by fraud, accident, or mistake, if it was not inserted with the concurrence of the testator.¹ In all such cases, parol evidence is admissible, even of the intention and declarations of the testator.² It is a general rule with respect to evidence under the Statute of Frauds and similar enactments, that these statutes do not exclude parol evidence of a negative nature—proving not what a party did, but what he did not.

[The distinction, therefore, suggested by the court in *The Earl of Newbury v. Countess of Newbury*³ is, as Jarman observes,⁴ founded in reason. Parol evidence cannot be used to show that the testator used certain terms under mistake or misapprehension of their meaning, or that certain words are omitted from the will. Yet, it can be proved by parol, on an issue *devisavit vel non*, that clauses have been fraudulently or even inadvertently introduced into the will, although the expunging of these clauses may amount in effect to a total change in the meaning of the other parts.

[This doctrine, however, appears to be cautiously acted upon, as it tends to repeal the wills acts much more effectually than the admission of parol to explain, without expunging, a passage.

¹ *Small v. Allen*, 8 T. R. 147; *Powell v. Mouchett*, 6 Mad. 216.

² *Smith v. Fenner*, 1 Gallis. 172; *Calvin v. Warford*, 20 Md. 357; *Doe v. Hardy*, 1 Moo. & Ry. 525.

³ 5 Madd. 364.

⁴ Vol. I, 355.

[Where a testator signed a document, erroneously thinking it was a will already executed by him, the first will was upheld by parol evidence of the facts.¹

[And if a will is fraudulently destroyed before grant of probate, the legacies will be upheld.² The decision in *Thomason v. Driskel*,³ to the contrary, does not seem to be based on any sound principles.

[A devisee who has contracted with the testator to stand seized to an illegal use, retains the legal estate, but is a trustee for the heir or next of kin,⁴ and parol evidence is not admissible to rebut this resulting trust.⁵

[Where a testator is, by means of a promise that his wishes will be carried out, prevented from making a new will, the promise will be specifically enforced against the promisee.⁶

[See, also, *Williams v. Fitch*,⁷ where it was held the real beneficiary might recover the gift as a *donatio mortis causa*, in an action for money had and received.⁸

[Persuasion, of course, is not equivalent to force, pressure, or undue influence.⁹ The influence, to be deemed undue, must have been sufficient to destroy the testator's free agency on the point in question.¹⁰

[Upon the question of undue influence, see *Huguenin v. Beasley*.¹¹

¹ *Small v. Allen*, 8 T. R. 147. See *Powell v. Mouchett*, 6 Mad. 216.

² *Legatees of Langdon v. Heirs of Langdon*, cited in 22 Vt. 50.

³ 13 Ga. 253.

⁴ *Strickland v. Aldridge*, 9 Ves. 516.

⁵ *Lewin on Trustees*, p. 181.

⁶ *Chamberlaine v. Chamberlaine*, 2 Free. 34; *Fearon, ex parte*, 5 Ves. 633; *Barrow v. Greenough*, 3 Ves. Sen. 151.

⁷ 18 N. Y. 546; 1 Redfield, 512.

⁸ See, also, *Chamberlain v. Agar*, 2 Ves. & Bea. 262; *Mestaer v. Gillespie*, 11 Ves. 638; *Chamberlaine v. Chamberlaine*, 2 Free. 34; *Bryn v. Godfrey*, 4 Ves. 10; *Paine v. Hall*, 18 Ves. 475; *Ridley v. Ridley*, 11 Jur. N. S. 475.

⁹ See *Hall v. Hall*, Law Rep. 1 P. & D. 481; *Hall v. Hall*, 38 Ala. 131; *Fountain v. Brown*, Id. 72.

¹⁰ *Mountain v. Bennett*, 1 Cox, 353.

¹¹ 2 White & Tud. Lead. Cas.; *Davis v. Calvert*, 5 Gill. & J. 302, 303; *Duffield v. Robeson*, 2 Harring. 384; *Tomkins v. Tomkins*, 1 Bailey, 92; *Beall v. Mann*, 5 Ga. 456; *McMahon v. Ryan*, 20 Penn. St. 329; *Small v. Small*, 4 Greenl. 223, and the chapter in supplementary treatise on "Void Testamentary Gifts."

[*Semble*, in the United States, a stronger degree of influence is required than in England to invalidate a will on the ground of undue pressure.¹

[Where a clause in a will is proved by parol, and found by a jury not to be the will of the testator, and is expunged by the court, this does not necessarily render the other parts of the will void. These passages, if they are at all separable from the faulty ones, and are not tainted with the same defect, remain valid.² This is a question of construction for the court, and not open to proof by parol. If the mistake is one of omission, as, for instance, the neglecting to insert a particular gift as directed by the testator, such an omission cannot affect the soundness of the written will, for such omission cannot be proved by parol, except for the purpose of converting the residuary beneficiary or the representative of the testator into a trustee for the person who was cheated of his gift. This superadding of a trust to the gift in the will does not directly affect the construction of the will or the will itself. The case suggested is one clearly collateral to it.

[Parol evidence is admitted in all the States to show that the real date of execution is different from that stated in the will.³ This is in accordance with the general rules of evidence, which distinguish the *res gestæ* of a written document from its construction.

[As parol evidence is admissible to show that a will was obtained by fraud, it is thus easier to defeat a will or a clause therein *in toto* than to rectify it or modify the primary sense of its clauses by parol evidence. In *Doe v. Small v. Allen*,⁴ the testator being pressed to execute a second will, asked if it was the same as the first, and was told that it was, whereon he executed the second will, which proved to be different. The Court of King's Bench held that evidence of these facts ought

¹ *Harrison's Will*, 1 B. Mon. 351; *Miller v. Miller*, 3 S. & R. 267; *Lowe v. Williamson*, 1 Green Ch. 82; see, however, *Goble v. Grant*, 2 Green Ch. 629.

² *Salmon v. Stuyvesant*, 16 Wendell, 321; see *Comstock v. Hadlyme*, 8 Conn. 254.

³ *Reffell v. Reffell*, Law Rep. 1 P. & D. 139; *Goods of Thompson* Id. 8.

⁴ 8 Durn. & East, 147.

to be received. But if the question was not *devisavit vel non*, the validity, effect, or construction of the will could not be aided by parol, except in the cases arising under Propositions Three and Seven.

[When a will is rectified, on the ground that it is also a contract; or, rather, when the heir of the testator is held bound by a promise, the consideration for which is the omission by his ancestor to make a certain devise, this equity is not one of construction. In *Strickland v. Aldridge*,¹ Lord Eldon puts the case of an estate suffered to descend in consequence of a promise by the heir that he would provide for the intended devisee. Several such cases have *since occurred*. These are all instances of fraud, and not of construction. However, the courts decide that the heir is in such cases a trustee, by reason of his *mala fides*, though such a constructive trust is contrary to the provisions of the Statute of Frauds. So, if a father devises to his youngest son, by reason of the latter promising that he will pay £10,000 to the eldest son, this fact may be proved by parol, and the youngest son will be decreed to be a trustee accordingly.² In all such cases, the party charged can be compelled to discover whether he made this alleged promise. If denied, it may be proved by parol *aliunde*.³

[Any relevant parol evidence is admissible, if the question is one of fraud, undue influence, or *devisavit vel non*.⁴ The statutes of wills do not, more than the Statute of Frauds, say that all written wills shall bind, but only that unwritten wills shall not bind. Therefore, parol testimony to defeat a will or a part thereof, on the ground of fraud, undue influence, or illegality of any kind is not forbidden by the Will's Acts.

[The admission of parol evidence to prove that a will was executed under the influence of fraud, is neither technically nor substantially a violation of the statutes of wills. For, a fraudulent act is in law as if it never was done. It is wholly void, and a mere nonentity.⁵ Every kind of undue influence

¹ 9 Ves. 516.

² 1 Jarm. 357.

³ *Colgate D. Owing's Case*, 1 Bland, 397; *Guallaher v. Guallaher*, 5 Watts, 200; *Oldham v. Litchford*, 2 Vern. 506.

⁴ *Hughes v. Hughes*, 31 Ala. 519; *Beaubien v. Cicotte*, 12 Mich. 459; *Noble v. Enos*, 19 Ind. 72; *Fairchild v. Bascomb*, 35 Vt. 398.

⁵ *Davis v. Calvert*, 5 Gill. & J. 269, 303.

is a species of fraud, and so is a direct abuse of a testator's confidence, by inducing him to believe slanders of intended objects of his bounty.¹ Parol evidence is admissible in support or rebuttal of such charges of fraud.² Such charges are questions of fact, to be determined by a jury. They are, strictly considered, therefore, not questions of construction, but of probate. However, as they afford unlimited facilities for the adduction of parol evidence, it is desirable that such cases should be discriminated from those where parol evidence is sought to be used, not for the purpose of invalidating a will or any disposition therein, but, on the contrary, of effectuating it in some secondary sense of the terms used.

[Mr. Justice Story considered that declarations made before and at the time of the execution of the will are admissible as part of the *res gestæ*, but not if they were made so long after the will as not to form part of the transaction.³

[The question how far declarations made by the testator after the making of the will are admissible to prove that it was extorted by fraud cannot be considered as settled in the United States. There are numerous authorities on both sides. Best, Ch. J., in *Provis v. Reed*,⁴ said: "If such evidence were admitted, some witness would constantly be brought forward to set aside the most solemn instrument." This argument, however applies only to the weight, and not to the admissibility,⁵ of the evidence. Witnesses, surely, cannot be so easily adduced, in despite of the laws against perjury, to prove anything at random. If they could, all titles would have long since ceased to have any value. Yet the *res gestæ*, even as to the making of a deed, have always been held to be open to parol.

¹ *Dietrick v. Dietrick*, 5 Serg. & R. 207; *Nussear v. Arnold*, 13 Serg. & R. 323; *Patterson v. Patterson*, 6 Id. 56.

² *Collins v. Hope*, 20 Ohio, 492.

³ *Smith v. Fenner*, 1 Gallis, 170; *Provis v. Rowe*, 5 Bing. 435. See, however, *contra*, *Stevens v. Vancleve*, 4 Wash. C. C. 265; *Means v. Means*, 5 Strobb. 167; *Cawthorn v. Haynes*, 24 Mo. 236; *Roberts v. Trawick*, 17 Ala. 55. See *Reel v. Reel*, 1 Hawks. 248, 268; *Howell v. Barden*, 3 Dev. 442.

⁴ 5 Bing. 435.

⁵ See *Pemberton v. Pemberton*, 13 Ves. 301.

[The New York Court of Appeals has decided in favor of admitting subsequent declarations of the testator, in *Waterman v. Whitney*.¹ If the question were one of a revocation of a good will, and not of fraud in procuring a void will, the declaration, of course, could not be admitted, except it were part of the *res gestæ* of an actual revocation. The current of authorities is in favor of extending the inadmissibility of the evidence in question to cases of fraud, though the contrary view is also propped by authority.

[In a question of fraud, indeed, there is, in point of principle, no limit to the admission of *relevant* parol testimony,² as such must relate to the *res gestæ*.

[Declarations respecting a past occurrence are generally not admissible in evidence, as they are mere unattested hearsay, when they are not part of the *res gestæ*. But where the act is continuous for a long period, any declaration made during that interval is part of the *res gestæ*.³ Declarations made by a testator, that he was induced fraudulently to make a preceding will, appear therefore to be admissible, on the ground that the fraud or undue influence was one continuous act or influence down to the time of the declaration. While the will continued unrevoked, the *res gestæ*, in such a case, may be considered as not complete. There is certainly a difficulty in admitting the declarations of the testator prior or *subsequent* to the making of the will. But this difficulty seems to be met by the consideration stated.⁴ The declaration may be received not as a revocation, which it is not, but as a part of one continuous act, since the will does not operate prior to the death of the testator, and if fraud have been practiced on him, the instrument is, in point of law, a nullity.

[The value or weight, however, of a declaration made after

¹ 5 N. Y. 157.

² See *Hughes v. Hughes*, 31 Ala. 519; *Beaubien v. Cecotte*, 12 Mich. 459.

³ *New Milford v. Sherman*, 21 Conn. 101; *Marsh v. Davis*, 24 Verm. 363.

⁴ As to what acts are *res gestæ*, see *Haynes v. Rutter*, 24 Pick. 242; *Rawson v. Haigh*, 2 Bing. 104; *Mitchum v. State*, 11 Geo. 615; *Bank of Woodstock v. Clarke*, 25 Vt. 308.

the execution of a will is almost *nil* as regards the evidence of the circumstances under which the instrument was made, since, if the testator really wished to revoke, there was nothing to prevent him from doing so. But the evidence seems admissible in point of principle, although the question is one of great difficulty. Such an *ex post facto* declaration was admitted in evidence in *Taylor v. Kelly*.¹ It can hardly be necessary to state here, that when parol evidence is admitted to invalidate a will, similar evidence is equally admissible to establish and confirm it. So with respect to such resulting trusts as can be rebutted by parol; they may also be corroborated by parol.

[In questions of fraud, then, declarations of the testator have been wholly rejected in several cases.² In some instances, however, declarations made long subsequent, or prior, to the will have been admitted,³ while in many other cases cotemporaneous declarations alone, on the ground of being part of the *res gestæ*, have been admitted.⁴ In point of principle, all declarations made by a person suspected of having been unduly influenced, are evidence on that point; nor are they hearsay, since they are not tendered as evidence of the testator for or against himself, but as facts by means of which the jury may be aided in their estimate of the free agency of the testator, just as the sayings of a person of weak mind prove neither the truth nor falsity of what is thus spoken, but only his capacity. When, then, the fact of a declaration is sworn to, how is the evidence of the nature of hearsay, since the truth or falsity of the declaration is not necessarily put in issue. Indeed, an unusual exclamation of endearment might be stronger proof of undue influence than a declaration of the testator that he was conscious he was about being imposed upon. For, influence, when really undue, and especially fraud, imply that the vic-

¹ 31 Ala. 59; *Blakey v. Blakey*, 33 Ala. 611.

² *Stevens v. Vancleve*, 4 Wash. C. C. 265; *Comstock v. Hadlyme*, 8 Conn. 254; *Jackson v. Kniffen*, 2 Johns. 31.

³ *O'Neill v. Murray*, 4 Brad. Sur. 311; *Roberts v. Trawick*, 17 Ala. 55. See *Cawthorn v. Haynes*, 24 Mo. 236; *Denison's App.* 29 Conn. 399; *McNinch v. Charles*, 2 Fich. 229.

⁴ See *Waterman v. Whitney*, 5 N. Y. 157; *Boylan v. Meeker*, 4 Dutcher, 274.

tim is unconscious of the imposition thus practiced upon him. Even if the truth or falsehood of the testator's declarations be deemed to be put in issue, yet such statement of an act which is only inchoate until his death seems, as already stated, to be part of the *res gestæ*. In *Thomas v. Thomas*,¹ indeed, the gift in question was held to be void, rather than to be explained by parol evidence of declarations of the testator not simultaneous with the making of the will. But this case is now virtually overruled, being met by the array of authorities already cited on the opposite side. The later cases, even in England, are thus in favor of admitting the testator's declarations, no matter when they were made.²

[As to the admissibility of evidence of declarations made by a testator after making his will, to prove that he had never made it, see *Boylan v. Meeker*.³

[In *Ryers v. Wheeler*,⁴ it was held that declarations made at the time of the will could not be received, although if made at any other time they would be admissible. This decision would almost seem to be founded on a supposed analogy between the construction of a will, and the doctrine that a written contract cannot be explained, but may be subsequently waived by parol. There is, however, of course, no real analogy between such a case and the construction, as distinguished from the revocation, of a will, or the ademption of a legacy.⁵

It is clear, then, that parol evidence may be used to defeat a will as well as to apply it under Propositions Three, Five and Seven.

213. II. That the legitimate purposes to which—in succession—such evidence is applicable, are two: namely, first, to determine whether the words of the will, with reference to the facts, admit of being construed in their primary sense; and, secondly, if the facts of the

¹ 6 Durn. & East, 671.

² *Deo d. v. Allen*, 12 Ad. & Ellis, 451. See 1 Jarman, 408, where the dictum in *Thomas v. Thomas*, 6 T. R. 677, is said to be overruled.

³ 4 Dutcher, 274.

⁴ *Wadsworth v. Ruggles*, 6 Pick. 63; *Ayres v. Weed*, 16 Conn. 291, 300; see *Brown v. Saltonstall*, 3 Met. 423.

⁵ 22 Wendell, 148.

case exclude the primary meaning of the words, to determine whether the intention of the testator is certain in any other sense, of which the words, with reference to the facts, are capable.—And,

214. III. That intention cannot be averred in support of a will, except in the special cases which are stated under the Seventh Proposition.

215. The writer of this Examination, then, whilst he admits and insists upon the rule stated in an early page,¹ “That the judgment of a Court, in expounding a will, should be simply *declaratory* of what is *in* the instrument,” hopes that he may, in this place, without fear of correction, add that—consistently with that rule—

I. Every claimant under a will has a right to require that a Court of construction, in the execution of its office, shall—by means of extrinsic evidence—place itself in the situation of the testator, the meaning of whose language it is called upon to declare.² And that,

II. The only cases in which evidence to prove intention is admissible, are those in which the description in the will is *unambiguous* in its application to each of several subjects.

¹ *Supra*, pl. 5.

² *Supra*, pl. 26.

APPENDIX.

No. I.

GOBLET *v.* BEECHY.¹

JOSEPH NOLLEKENS, the sculptor, made his will, and fourteen codicils thereto.

By his will, dated the 21st of March, 1818, after giving several pecuniary, and some specific legacies, he gave to Sebastian Gahagan, Alexander Goblet (the plaintiff), and George Lupton, described as three of his workmen, £100 each, to be paid as soon as convenient after his death; and to George Gahagan, another of his workmen, £20, to be paid in like manner; and to Louisa Goblet, a daughter of the plaintiff, £30. The will then proceeded as follows:—"I desire my collection of virtu in antiques, marbles, busts, models, printed books, prints, and drawing (except such books and prints as I have hereinbefore given), be sold by public auction; and that the said Alexander Goblet be employed to arrange, repair, and clean my said marbles, busts, and models, to fit them for sale, under the direction of my said executors; and that the said Alexander Goblet be paid for his trouble, at the rate of one guinea a day, during such time as he shall be engaged, and which I suppose will be effected in three or four days: and I desire that my said antiques, marbles, busts, and models, books, prints, and drawings, be sold by Mr. Christie, of Pall Mall. I give to Francis Douce, Esq., and to the Rev. Edward Balme, the executors of this my will, the sum of £500 each, as an acknowledgment for their trouble." In a subsequent part of the will was the following passage:—"And as to my property in

¹ See S. C., 3 Sim. 24.

the funds, in the Bank of England, the moneys to arise by the sales hereinbefore directed, the debts that shall be owing to me at my decease, and all other the residue of my estate and effects whatsoever, I give the same to Mr. Francis Russell Palmer, of Cumberland Place, New Road, and the said Francis Douce, and the Rev. Edward Balme, equally to be divided between them ; and I appoint the said Francis Douce and the Rev. Edward Balme, executors of this my will."

By the 5th codicil, dated the 29th of January, 1819, the testator, after declaring that he had revoked the aforesaid residuary bequest, in lieu and stead thereof, gave and bequeathed the said property in the funds, in the Bank of England, the moneys to arise by the aforesaid sales, the debts that should be owing to him at his decease, and all other the residue of his estate and effects whatsoever, unto the said Francis Russell Palmer, the defendant Francis Douce, the Rev. Edward Balme, and the Rev. Thomas Kerrick, equally to be divided between them.

By the 6th codicil, dated the 15th of April, 1819, the testator revoked the legacy of £100 given by his will to the plaintiff, and gave him, in lieu of such legacy, an annuity of £30 for his life.

The 8th codicil, dated the 7th of February, 1820, was as follows :—"Whereas, by a former memorandum, I had directed that the marble in the yards, and the working tools in the study, should be equally divided, and one-half given to Mr. Alexander Goblet ; I do hereby revoke such former direction, and, instead thereof, do hereby will and direct that the whole of the said marble, and all the working tools in the study, be delivered by my executors to the said Alexander Goblet, for his sole use and benefit, in consideration of his care and attention to me. And whereas, in the aforesaid memorandum, I had directed my books, drawings, and prints, should be sold by auction, by Mr. King, I do hereby direct that they be sold by Mr. Evans, of Pall Mall. February 7, 1820. Joseph Nollekens."

In the 9th codicil, the testator made mention of Henry Goblet, a son of the plaintiff.

The 10th codicil, dated the 14th of August, 1820, and

written immediately following the 9th codicil, was as follows:—
 ‘All the working tools in the shop I give to his father, with, the marble in the yard, and the boards and utensils for working the jack I lent to Supto above a year ago, he *out to retern* it, I have paid and for what. J. Nollekens, this 14th day of August, 1820.”

The 11th codicil was in the testator’s own handwriting, except the attestation thereof by the subscribing witness, Mary Holt, and was as follows:—“This 28th day of January, 1822. Memorandum, that, in case of my death, all the marble in the yard, the tools in the shop, bankers, *mod*¹ tools for carving, the rasp in the draw, with [*nevre or nepre*],² and the draw in the parlor, shall be the property of Ales. Goblet. Joseph Nollekens. Witness my hand, Mary Holt.”

By the 13th codicil, the testator appointed the defendants his executors.

The testator died in April, 1823, and his will and codicils were proved by the above-named executors. The testator had certain models, which his executors sold, and which produced the sum of £738 13s. The articles mentioned in the 11th codicil, except those intended by the word “mod,” were of trifling value.

By a decree of the Court, bearing date the 14th of February, 1824, made in a cause in which Francis William Russell, in the said will called Francis Russell Palmer, the said Francis Douce, and Thomas Kerrick, were plaintiffs,

¹ In the original codicil, the word “mod” was at the end of a line, and was followed by a small mark, the purport of which appears to have been equivocal. the plaintiff contended that the mark was the letter “S,” and that the word or letters “mod,” with the mark, was an abbreviation of a complete word “models.” It was contended, on the part of the defendants, that the mark was a hyphen, and that the words or letters “mod” was an integral part of an unfinished word; or that the disputed mark was intended for the letter “g,” as mentioned in the answer of the defendant Douce. Much argument (as the writer is informed) proceeded upon this distinction, when the cause was heard upon the exceptions to the Master’s report. The witnesses in the cause, and Mr. Caley, who was called by the Master, do not appear to have determined what the mark was. Mr. Garrard, however, who was also called by the Master, appears to have considered and treated the mark as the letter “S.” In the statement of the case in the above report, the word is called indiscriminately “mod.”

² These words are almost illegible.

and the said Sir William Beechey and John Thomas Smith, and others, were defendants, the usual accounts of the personal estate of the testator, Joseph Nollekens, were directed to be taken.

The plaintiff went in before the Master, under the decree in the cause of *Russell v. Beechey*, and, under the 11th codicil, claimed the money produced by the sale of the models. The Master disallowed the claim.

On the 29th of October, 1824, the plaintiff filed the bill in this cause against Sir William Beechey, Francis Douce, and John Thomas Smith, as defendants. The bill referred to the will of Joseph Nollekens, and stated the 11th codicil thereto. The bill then stated, that the defendants *pretended* that the word "mod." in the 11th codicil, was an abbreviation of, and was meant and intended for, the word "modelling," and was to be joined in construction with the following words "tools for carving;" and that the testator did not by his 11th codicil intend to bequeath to the plaintiff his models and tools for carving, but only his modelling tools for carving. The bill then charged that the intention of the testator was to bequeath to the plaintiff his models; and that the word "mod," in the 11th codicil, was an abbreviation of the word "models;" and that there was no sense in the alleged expression, "modelling tools for carving," inasmuch as, in the art and practice of sculpture, tools for carving were not used for modelling: and that there was no word, other than the word "models," which the word "mod," with reference to the contents of the will, and the nature of the testator's property and business, could be taken to denote or signify.

The bill further charged, that the 11th codicil was in the hand-writing of the testator: and that, after the same was written by him, it was, at his desire, read over to him by Mary Holt, the attesting witness thereto, in whose presence the same was written, and who was in the service or employment of the testator; and that when, in so reading over the 11th codicil, she came to the said abbreviation, she observed to the testator, that there was something imperfect or indistinct in such abbreviation, and asked him what he meant thereby; to which the testator answered, that he meant models, or to that effect.

The bill then prayed, that it might be declared, that, under the 11th codicil to the will of the testator, Joseph Nollekens, bearing date the 28th day of January, 1822, the plaintiff became entitled to the said models; and that the defendants, Sir William Beechey, Francis Douce, and John Thomas Smith, might be decreed to pay the plaintiff the sum of £738 13s., with all interest which had become due for the same; or to assign or deliver to the plaintiff the securities whereupon the same had been invested; and to pay the plaintiff the interest or other proceeds which had arisen therefrom.

The defendant, Douce, by his answer, *inter alia*, stated, that, amongst the estate and effects of the testator, Joseph Nollekens, at the time of his death, were certain very valuable models of various descriptions, used, or intended to be used, if occasion required, for the purposes of and belonging to the business of a sculptor, but which models were, many of them, of themselves rare and valuable specimens of art, and, as such, very desirable and of great worth for the cabinets and collections of persons of taste, and collectors of works of art of such nature and kind, and so esteemed by the testator himself. He further said, he believed that such models were occasionally, and when necessary or convenient, used by the testator in his lifetime for the purposes of sculpture, and in his study and practice of that art; and were also kept and preserved by him as being, of themselves, intrinsically very rare and curious works of art, and of great value to all lovers of the fine arts, or of that particular branch thereof.

The answer admitted the sale of the models, and the receipt by Douce and his two co-executors of the money produced by such sale, and that no part thereof had been paid to the plaintiff.

The defendant, by his answer, insisted, that, according to the true construction of the will and codicils, the plaintiff was not entitled to the models, and that the word "mod," in the 11th codicil, was incapable, either abstracted or by connection with other parts of that codicil, of being applied to the models claimed by the plaintiff, or to any other models.

The answer then insisted, that, from the context of the

will and codicils, the testator meant to use the word "modelling," and that he omitted by mistake to repeat, or insert twice instead of once, the word "tools," in which case the expression would have been "modelling tools, tools for carving;" and which the defendant believed the testator intended to express, but which he failed to do, from being at that time under a paralytic affection.

The answer further stated, that the testator, for some time before, and particularly about the month of January, 1822, and from thence up to the time of his death, had great difficulty or thickness in his enunciation or manner of speaking, whereby it was frequently very difficult, if not impossible, to understand him distinctly or correctly when he spoke; and that, if any communication, as in the bill mentioned, took place between the testator and Mary Holt respecting the 11th codicil (but which the answer did not admit), it was probable that Mary Holt might have misunderstood what the testator said, and that he might have attempted to pronounce in explanation the word "moulds," a great number of which were in his possession, and were not by him specifically disposed of.

The answer then insisted, that the 11th codicil must be construed by a reference to, and consideration of, the contents of the instrument, and of the will, and of the other codicils thereto; and that the principle case was not one in which any evidence could be received of parol declarations of the testator as to what he meant.

The other defendants, by their several answers, submitted the point in question to the judgment of the Court.

Witnesses were examined on the part of the plaintiff.

It was proved that the plaintiff had been in the service of the testator thirty years, and was held in great estimation by him.

Charles Rossi, a sculptor, deposed, that there were not such tools as "modelling tools for carving," and that there was not any sense or meaning in such tools as "modelling tools for carving;" that tools for carving were not used for modelling, except that, when the model was moulded and cast in plaster, carving tools were used, but that tools for modelling were not used for carving; that tools for modelling were made of bone

and wood, and sometimes of steel, and sometimes of brass; and that tools for carving were made of steel.

The same witness deposed, that in his opinion any sculptor would, by the word "mod," as used in the 11th codicil, understand that the testator meant "models;" and that he, the deponent, was of that opinion; and that having regard to the language of the 11th codicil, and to the nature of the business and description of utensils and specific articles belonging to the testator as a sculptor, there was not, in the deponent's opinion, more than one thing that the word "mod," as used in the 11th codicil, could signify, and that was "models."

Peter Rouw and Edward Hodges Bailey, both sculptors, gave evidence to the same effect as Charles Rossi.

Mary Holt deposed, that she was in the service of the testator from March, 1802, to January, 1807, when she married, and again from the month of August, 1820, when her husband died, up to the testator's death, she having returned to him at his particular desire, to attend on him in his infirmity.

She then deposed, that one day, in the month of January, 1821, or 1822 (but which of those years she did not then recollect), and, on the occasion of the witness going into the room in which the testator was sitting in his dwelling-house in Mortimer-street, he being then alone, with the 11th codicil before him (and which appeared to have been just written), asked her to witness the same, upon which she asked his permission to read it; and the testator having assented to the witness's request, she did read it aloud to, and in the hearing of, the testator; and the testator heard the same when read over; and she so read it immediately previous to her signing the same as a witness thereto.

She further deposed, that, at the time of reading the 11th codicil to the testator, and when she had read as far as the word "bankers," she asked the testator what he meant by the word "mod," being the word next following the word "bankers," in the 11th codicil; and that, in answer thereto, the testator pronounced the word "models;" and that she then asked the testator whether he meant Goblet (meaning the plaintiff in the cause) to have the models: and that, in answer thereto, the

testator said "yes;" and that she then said "bravo," thereby meaning to express her satisfaction at the testator intending that the plaintiff should have the models alluded to by the testator; and that the testator then folded the 11th codicil up, and put the same into his pocket-book.

The cause came on to be heard in Trinity Term, 1826.

Mr. Shadwell and Mr. Sidebottom for the plaintiff.

Mr. Sugden, Mr. Joseph Martin, and Mr. Jacob for the defendants.

The cases cited were, *Hunt v. Hort*, 3 Bro. C. C. 311; *Price v. Page*, 4 Ves. 680; *Abbot v. Massie*, 3 Ves. 148; *Mohun v. Mohun*, 1 Swans. 201; *Andrews v. Dobson*, 1 Cox, 425; *Parsons v. Parsons*, 1 Ves. jun. 266; *Baylis v. The Attorney-General*, 2 Atk. 239; *Edge v. Salisbury*, Amb. 70; *Ulrich v. Litchfield*, 2 Atk. 372; *Dowset v. Sweet*, Amb. 175; *Careless v. Careless*, 1 Mer. 284; s. c. 19 Ves. 601; *Masters v. Masters*, 1 P. Wms. 421; *Norman v. Morrell*, 4 Ves. 769; *Kelly v. Powlett*, Amb. 605; *Brown v. Selwin*, Ca. tem. Tal. 240; *Fonnereau v. Poyntz*, 1 Bro. C. C. 472.

The Vice-Chancellor (Sir John Leach) said, that the case was not then ripe for decision, as it did not clearly appear what the letters were which formed the word "mod." He added, that he found no authority which exactly governed the case; but that, upon principle, he was satisfied, that, to admit the evidence of Mary Holt respecting the testator's declarations, would be to repeal the Statute of Frauds. He, therefore, rejected her evidence; and, upon hearing the codicil to the will of the testator, dated the 28th January, 1822, and the proofs taken in the cause, except the depositions of Mary Holt, read, he ordered, that it be referred to the Master, to inquire and state to the Court, what the testator intended by the word between the word "bankers" and the word "tools," and the two words between the words "with" and "and," in the codicil to his will dated the 28th of January, 1822. And the Master was to be at liberty to call to his assistance persons skilled in the art of writing, and also persons who had a competent knowledge of tools and articles used in statuary. And it was ordered that the consideration of all further directions, and of the costs of the suit, be reserved until after the Master

should have made his report. And any of the parties were to be at liberty to apply as there should be occasion. Reg. Lib. A. 1825, fol. 1846.

The Master, by his Report, bearing date the 23d of June, 1827, certified, that he had been attended by the solicitors for the respective parties, plaintiff and defendants, and, in their presence, had proceeded to make the inquiry directed by the decree. And a state of facts had been laid before him on the part of the plaintiff, and another state of facts on the part of the defendant Douce, and the probate of the will and codicils of the testator, and the original codicil of the 28th January, 1822, and office copies of the depositions of witnesses examined on the part of the plaintiff in the cause (except such parts thereof as were held by the Court to be inadmissible) had been produced and read before him : and he found thereby that the testator, Joseph Nollekens, was an excellent sculptor, resident in Mortimer Street, Cavendish Square; and that, about the year 1791, having occasion for an assistant in his business, he wrote to Mr. Clarisseau, an architect, resident in Paris, to recommend him a young Franchman as a carver; and, in consequence thereof, the plaintiff, who was then in the employ of the sculptor to the King of France (Louis XVI.), was sent over by the said Mr. Clarisseau to this country, to the testator, into his employ or service. And he further found that the plaintiff continued from that period, that is, in the year 1791, in the employ or service of the testator, until the testator's death, which happened on the 23rd of April, 1823, and during that period was employed by the testator on many of his best works, chiefly as a carver, but frequently as a modeller, and acquired the esteem and confidence of the testator in a very great degree, insomuch, that for years previous to the testator's death, the plaintiff almost wholly resided in the testator's house with him, on a footing of great trust and confidence. And he further found, that, for some considerable time previous to his death, the testator was seized with a paralytic affection in his limbs, which deprived him of the use of his limbs, and confined him to the house; and that during the latter period, the plaintiff superintended the business of the testator, and gave great and unremitted attention to the same.

The Master, by his Report, further found, that the "bankers" mentioned in the 11th codicil, were solid pieces of wood, in which were placed blocks of marble when about to be worked; and that the bankers belonging to the testator, and also his tools for carving, and the rasp mentioned in the 11th codicil, were all matters of small and trifling value; but the models belonging to the testator, at the respective times of making his 11th codicil and of his death, were of great value, (that is to say), of the value of £700 and upwards.

The Master further stated, that he had availed himself of the liberty given by the decree, of calling to his assistance Mr. John Caley, a person skilled in the art of writing, and also that of Mr. Charles Garrard, of Brompton, sculptor and statuary, a person of competent knowledge of the tools and articles used in statuary: and that the said Mr. Caley, having examined the original codicil of the 28th of January, 1822, had made a transcript thereof, according to his judgment of the characters, a true copy of which was set forth in the first schedule to his report; and that the said Mr. Caley had personally attended the Master, and declared he could form no judgment of what was intended by the word "mod." And the Master further stated, that the said Mr. Garrard had also examined the said original codicil of the 28th of January, 1822, and had made a report, not only as to the word "mod," which he understood to be a contraction of the word "models," but as to the other two words, respecting which he was directed by the decree to inquire, and as to the proper reading of the codicil at large; and doubts having arisen as to the things intended by the word "models," supposing that to be the true reading of the contraction, the said Mr. Garrard had further, at the Master's request, explained the technical meaning of the word "models," as he, from his knowledge of sculpture and statuary, understood the same; and the Master set forth a copy of Mr. Garrard's report, in the second schedule to his (the Master's) report.

The Master then certified, as the opinion which he had formed, with such assistance as aforesaid, that the word intended by the testator by the word or contraction between the word "bankers" and the word "tools" was "models;" and that the things intended by him thereby were such articles as

were described by Mr. Garrard in his report to fall within the meaning of that term in its ordinary uses by sculptors. And he was further of opinion, that, by the two words between the words "draw" and "and" in the 11th codicil, the testator intended "with the apron," according to the reading or interpretation of Mr. Garrard, which appeared to him satisfactory, for the reasons assigned by Mr. Garrard in his report.

Mr. Garrard, by his report, which was referred to by the Master, after explaining the word "bankers," in the 11th codicil, to mean certain massive heavy benches used for the purpose of carving blocks of marble upon, added, that the first and only construction he could put upon the contracted word "mod^s," or upon the testator's intention when writing that word, was, that it meant "models;" that the testator intended to write models, and meant what he had written to be taken for and understood to be models, that is (according to the idea a sculptor annexes to the term), original material representations of forms, either existing in nature, or ideal.

The rest of Mr. Garrard's report related to the interpretation of parts of the codicil subsequent to the word "mod."

The defendant Douce excepted to the Master's report, on the ground that he ought to have stated and certified by his report, that he had been unable to discover or ascertain in any manner, and therefore could not state to the Court, what was intended by the testator by the word between the word "bankers" and the word "tools."

The cause came on to be heard in the matter of the exception, and on further directions, in Hilary Term, 1829, before the Vice-Chancellor (Sir Lancelot Shadwell), when his Honor overruled the exception—confirmed the Master's report—and declared that the plaintiff was entitled to the models, or the money produced by the sale of them; and ordered that the same, together with the costs of all parties, should be paid out of the testator's estate.—*Reg. Lib. A.* 1828, *fol.* 1633.

The decree, on further directions, was reversed on appeal by Lord Chancellor Brougham.—*Reg. Lib.*¹

¹ [His Lordship's judgment was as follows:—"The testator, who had previously by his will, and in express terms, disposed of his models at the time when he was disposing of all the rest of his collection, by a sub-

sequent codicil, being the 11th to that will, in a very unintelligible enumeration of articles, coupling them with tools, bankers, and marble in the yard, introduces the word 'mod.' with what seems, and may be supposed to be, a hyphen, a point, a blot, or a small *s* affixed; and the present question is as to the meaning of that word. The Master called to his assistance Mr. Caley, a gentleman skilled in writing, and also Mr. Garrard, who is said to be an eminent statuary, and he has adopted the opinion of Mr. Garrard as to the writing, instead of that of Mr. Caley, and found that the word 'mod.' was a contraction for 'models.'

Now, if I am to be bound by the evidence, the opinion of Mr. Caley is at least as good as that of Mr. Garrard. Although the former professed himself unable to form any opinion as to what word was meant to be expressed by the characters in question, he thought there was no *s* affixed. But in what company is the word 'mod.' found to occur? It is found, not among articles of value, but thrown in among the tools in the shop, bankers (which are great benches), the rasp, and something which is supposed to mean the testator's apron. It is, to say the least of it, singular that the testator should have introduced his models, which were of very considerable value, and were the very apple of his eye, among such an assortment. That is one reason. Another is, that the word 'models,' which occurs at full length in the will, would upon this construction be done away with, and that without any direct words of revocation, such as are found in the other codicils, where revocation was plainly the testator's object, and without any certainty as to what he really intended. He would thus by a doubtful, or rather by a half-word, revoke that which he had previously disposed of in formal terms. I have great doubts whether, if this were the case of a will of real property, in which the testator had made a formal devise of all his estates, and afterwards in a codicil, had introduced the letters 'est' in the middle of a gift of his pictures, books, cash at his bankers, furniture, &c., the codicil would be effectual to carry the estates previously given. It would be most dangerous to allow it to operate as a revocation of a previous devise, which had been solemnly made.

Upon these grounds I am of opinion that the exception must be allowed. 2 Russ. & Myl. 624.]

No. II.

ATTORNEY-GENERAL *v.* GROTE.¹

"I HAVE repeatedly and very often given my attention to this case. I have no hesitation to state, that I have often changed my opinion upon it. To state that I have never been able, to my own satisfaction, to reconcile the decisions to be found in the books upon cases which involved similar questions, is only to repeat what I often stated in Court. The difficulties in this case are probably increased by a Judge's being obliged to take the will and codicil as they are to be found in the probate, when, it is very probable, that their contents, when the testator made them, might influence the construction of such parts as must now be taken to be the whole of the will and codicil.

"I think there is evidence upon the face of the will, that the testatrix meant the legacies which she connects with the word 'stock,' to the legacies of stock which she had. She uses the expression, 'further parts of my stock;' I conceive she means to give what she has.

"The question is, whether she meant, where she gives £100 Long Annuities stock, the same as if she had given £100 per annum Long Annuities. It is difficult to get rid of a strong impression which the repeated variation of the terms, 'Gifts of £100 per annum Bank Long Annuities,' and the terms, '£100 Long Annuities stock,' to be found in this will, creates in the mind of a person reading the will. It is difficult to conceive that the testatrix really meant the same thing in both cases. But individual belief ought not to govern the case,—it must be judicial persuasion.

"Parol evidence of what the testatrix meant will not do, if

¹ The Author is indebted to his friend Mr. G. Richards for the above note of Lord Eldon's, taken from a MS. note in his Lordship's handwriting. [See 2 Russ & Myl. 699.]

there was any. In *Stafford v. Horton*, as I understand it, parol evidence, or what could only have been proved by parol declaration, was not held to be what should control the words of the will.

“After frequently changing my opinion upon the present case, as I apprehend evidence of the state of the funded property of the testatrix may be resorted to, I finally think that there is enough in the terms of the gift and the state of the property taken together, to authorize a Court to say, that the £100 was not to be £100 per annum. Those terms and that state, taken together, seem to me to authorize this construction of those legacies, as reasonably as any words in *Fonnerneau v. Poyntz* authorized a limited construction of sums of Long Annuities in that case.

“This is the opinion I have finally formed, after giving attention repeatedly to every part of the gifts in, and contents of, the will and codicil, and all the reasoning I have met with in Reports. That this is a very doubtful case, and that, therefore, no opinion of mine upon it, or as I think of anybody, can be represented justly as unquestionably right, I admit: but such as my opinion is, I have stated. If it is acted upon, the legacy in question is £100, and not £100 per annum.”

INDEX.

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PART II.

CONSTRUCTION OF WILLS.

A TREATISE
ON THE
INTERPRETATION OF WILLS

SHOWING THE
POINTS OF RESEMBLANCE AND CONTRAST BETWEEN
THE AMERICAN AND ENGLISH
RULES OF TESTAMENTARY CONSTRUCTION,

WITH
REFERENCES TO ALL THE LEADING AUTHORITIES
IN POINT,

BY JOHN P. O'HARA,
COUNSELLOR AT LAW.



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PREFACE TO PART II.

It has been doubted by Sir Edward Coke¹ and others whether the latitude of interpretation allowable in the case of wills has at all operated favorably to the material interests of the community. However, when once a testament came to be regarded as of a different nature from a deed, it was inconsistent to halt in the career of liberality and refuse to any term in a will a commonplace meaning. A marriage settlement is often copied from a preceding settlement, and a will in like manner is sometimes copied from a preceding will or partly from a deed. To give to the phrase "heirs of the body" in a will, therefore, a stricter signification than if the term used were "issue," "sons," or "children" frequently defeats a testator's intention. The technical phrase, in fact, when misapplied, indicates gross ignorance rather than a knowledge of law on the part of the testator.

Every regard to technicality, as such, in a will is a negation of its primary nature, viz., as an instrument made by a person *in articulo mortis*, *inops consilii*, and without the necessary time to prepare a technical document. Many persons are as unwilling to make their wills as to insure their lives. They do not wish to give any of their friends an interest in their timely decease. This disposition is natural and wholesome. A forced registration or open publication of wills is, therefore, out of the question. But, to construe a will by the light of technical rules is virtually to disregard a testator's desire of secrecy; inasmuch as the frequent consultation of a professional adviser is apt to lead to a discovery both of the fact that a will is in contemplation, and also of the provisions it is likely to contain. It is thus necessary, for the peace of

¹ 2 Bulst. 130.

families that wills should always be construed at least as liberally as hitherto. So far as precedents apply, they ought, no doubt, to be followed, especially if they are not isolated, but continuous for many years and pronounced or approved of by judges of eminence. Yet so far as the American law of wills is still unsettled—*adhuc sub Judice*—a liberal interpretation seems to be much more expedient than an adhesion to technicality.

Our courts have hitherto construed wills in a less technical spirit than the English cases warranted. Besides the leading points of contrast between English¹ and American law mentioned in the introduction to Part I the reader will find in the index to this treatise, under the title "American law," all the points in respect to which the testamentary codes of the two nations differ. It will be apparent from this survey that our courts have still a wide margin for discretion upon many questions.

Although this treatise professes to comprise only rules of construction, yet the reader may find a sufficient sketch of the law relating to the execution and revocation of wills in general, to enable him to dispense with further light on these points, except so far as the special requirements of State statutes render necessary.

In order to define with exactness the scope and bounds of rules of construction, occasional reference has been made in this work to rules of law and rules of administration. Of the nature of rules of law enough has been said in the Introduction to Part I.

Rules of administration relate to the variable incidents of property. Some of the elements of estates in land and of other legal interests are invariable. Such are the incidents of alienation by tenant in fee, liability to debts, &c. But, other elements of property may be moulded by any testator as he pleases. All rules of construction, for instance, as described in the introduction, are at his mercy. So are all rules of administration. They are only so far like rules of law that they are incidents of property and not inferences of construction. But, they also so far resemble rules of construction that they are variable at the

¹ Page 12.

PREFACE TO PART II.

choice of each testator. He can make his realty, or a particular part thereof, or of his personalty, to be the primary fund for payment of his debts, though he cannot wholly defeat by will the claims of his creditors. For a liability to debts is an incident of property that springs from a rule of law, and is not variable like a rule of construction or of administration. So with respect to the other immutable incidents of estates and property. These are few. But they are unalterable, and are, so to speak, the constitution round which legal construction gyrates, but which it cannot control. They are the same in wills as in deeds, although certain rules of construction for deeds are also rules of law. But, in wills all rules of construction, or of administration, under which are comprised the doctrines of exoneration and marshalling, are subject to the testator's directions. Rules of law or of public policy are the only doctrines which he cannot successfully invade. They can only be altered or deprived of their universal force by a statute.

Besides the whole law of testamentary conveyancing, the nature of charges on land, the charging powers of tenants in tail, and the incidents of powers in general, both under the statute of uses and in equity, are treated of in the following pages, so that the work, besides compassing its own proper ground, enters largely upon conveyancing by deed. This perhaps was not strictly necessary for the elucidation of testamentary rules, yet, few will consider that the lateral support which many doctrines of testamentary construction find in rules of construction generally can be too extensively surveyed.

Much difficulty is likely to be experienced in future in America, in construing statutes that alter some old rule of the common law. The author, therefore, bestowed more attention upon the case of *Mellish v. Vallins*¹ than its importance at the present day seemed to require. He has also with a similar view dwelt upon the question whether remainders can be too remote, as this enquiry is, in the present turning point of the old rule, apt to give rise to some further argument not only here but also in England. The law relating to precatory trusts, the meaning of the word "survivor," and the other points referred to in the index under the title "American Law," is also

¹ 2 Jo. & H. 194; *infra*, 236.

perhaps in a state of transition. Upon these and similar doubtful points the author has endeavoured to discuss the rules in question with somewhat of detail. Much more room, it is obvious, is open to litigation under wills here than in England, where the whole ground is nearly covered by authority. There is reason, however, to hope that our courts will adopt the principles acted hitherto by them with respect to the rule in *Shelley's case*, and will discard all mere rules of conveyancing, except as helps to understanding the particular wishes of the testator.

The statements in this work are very condensed; else, indeed, it would have been impossible to comprise such a quantity of legal matter in so small a compass. If any passage appears obscure, it is to be hoped that the difficulty is owing to this source, and that a patient examination will repay the practitioner for the labor of his research.

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CHAPTER I.

NATURE AND INCIDENTS OF WILLS.

§ 1. *Relations of American to English testamentary law.*

A BRIEF account of the relations of American testamentary law in general, to the common, statute, and case law of England, seems necessary for the completeness of a sketch of the rules relating to the construction of wills.

The English colonists brought here with them the English law.¹ The Congress of 1774 proclaimed this doctrine, and it has not been since disputed. Conquest or revolution, indeed, does not necessarily imply that the old law continues. However, since the American revolution and the declaration of independence by the United States, the common law, as far as it is not inconsistent with our political constitution and circumstances, has been expressly adopted by Massachusetts, New York, New Jersey, and Maryland. It has also been recognized by the courts of the other States.² The old public general statutes of England are also deemed parts of the common law of the several States.

The constitution of New York, of 1777, declared that the law of the colony, as it existed on the nineteenth of April, 1775, should continue to be the law of

¹ Calvin's case, 7 Co. 17; Commonwealth v. Leach, 1 Mass. 60; 2 *Id.* 534.

² Kent's Comm. vol. I, 472, 473, notes.

the State. The law of England, as it was prior to the fourth year of James the First, so far as it was of a general nature, was adopted by Virginia, Ohio, and Arkansas. In Illinois, Indiana, and Missouri, the same recognition was made, with the exception of the usury laws. The common and general statute laws of England, down to 1776, were also adopted in Mississippi and Georgia. Vermont, likewise, has recognized the laws of England as they were in 1760. Rhode Island has adopted the English written and unwritten law down to 5 Anne, chapter 6. New Jersey has also adopted the bulk of the English law. The civil code, of Louisiana¹ has repealed the French, Spanish and Roman laws, but not its own common law, or the *rationes judicandi* in force when Louisiana was ceded to the United States.² The district court of that State has equitable powers, and is bound by the rules of the English Chancery. Several of the leading English statutes, too, have been expressly adopted by several of the State legislatures. The provisions of the Statute of Frauds, especially, have been re-enacted in almost all of the States.³

The common law is no essential part of federal jurisprudence.⁴ But, as various State laws relating to person and property are rules of decision for the federal courts,⁵ a large portion of the English common law is thus indirectly imported into federal law. The Constitution, laws, and decisions of the American Union, however, form its essential jurisprudence.

¹ Art. 3, § 21.

² *Reynolds v. Swan*, 13 Louisiana Rep. 193; *Gaines v. Rolt*, 15 Peters' U. S. 9.

³ Greenleaf on Ev. vol. I, § 26, 2 b.; 29, c. 2, e. 3; 4 Kent's Comm. 95, note b, 4th ed.; see Browne on Statute of Frauds, App. pp. 501-532.

⁴ *Wheaton v. Donaldson*, 8 Peters' U. S. 658.

⁵ 10 Wheaton, 109.

It is hardly necessary to add that no statute passed in England since the declaration of the independence of the United States, has, of itself, any authority here. But, as many of such acts are merely declaratory of the civil or common law, it follows that at least, when they profess to be so declaratory, they are of weight with our tribunals. Decisions by the English courts *in pari materia* have also very great weight here, especially where the case has gone through an appellate course. With the exception of the points noticed in chapter 2, § 1, there is hardly any appreciable difference between the testamentary codes of the two countries, as regards rules of construction. Our courts, however, as is stated in the author's edition of Sir James Wigram's treatise, admit parol evidence more freely than is done in England. Still, as the American rules of construction, or of internal, as distinguished from external evidence, are so similar to the analogous British rules, there is ground to hope that the following work will be of use even to the English practitioner, in giving him, in a condensed form, the pith of our leading rules and decisions in testamentary law.

The statutes of most of the American States require wills to be in writing. Besides, the chief provisions in the last English Wills Consolidation Act¹ are either copied from previous American enactments, or have been since adopted in several of the States. The law of England, as settled by that statute, is thus a fair sample of our average testamentary law. Accordingly, the cases—and they are legion—decided under that act, will most probably be found to hold out almost unerring lights on any paths not yet traversed by American adjudication. The following treatise, however, has been intended to give, or refer to, only the more important of the English decisions.

¹ 1 Vict. c. 26.

§ 2. *A will defined and explained.*

A will may be defined to be a legal revocable disposition of one's property, to take effect from his death.¹

Such an instrument may be couched in any form or language, provided that its whole operation is postponed until the death of the grantor. In one case there was both a consideration for the grant, and words of immediate transfer, yet the instrument was held to be testamentary.²

The general criteria of a will, however, are that it is voluntary and not of operation until after the death of the grantor. Yet, a deed to trustees to the use of the grantor, A, for life, remainder to the use of B, with power of revocation to A, is not a will but a deed, and is not subject to probate or legacy duty. The test appears to be the passing of any interest legal or equitable during the grantor's life. If such interest pass, though it be but a bare seisin to uses, the instrument is not testamentary. Parol evidence is admissible to show the *res gestæ* and the intention of the testator as to whether the document was to be testamentary.³

Where no statute requires a will to be in writing or to be executed with any formality, probate will be given to any testamentary act, even to receipts for stock, bills endorsed "for A, B,"⁴ assignments of bonds,⁵ letters,⁶ marriage articles,⁷ and deeds,⁸ or promissory notes,⁹ of a testamentary and revocable

¹ See *Langdon v. Astor*, 16 N. Y. (2 Smith), 9, 49.

² See 4 Hawks, 141.

³ *Harrington v. Bradford*, Walker, 520.

⁴ *Sabine v. Goate*, 2 Hagg. 247.

⁵ *Musgrave v. Down*, cited in 2 Hagg. 247.

⁶ *Drybutter v. Hodges*, Id. 247.

⁷ *In re Knight*, 2 Hagg. 554.

⁸ Id.

⁹ 1 *Maxee v. Shute*, cited in 2 Hagg. 247.

nature. It is, however, sometimes exceedingly difficult to determine whether the instrument or act propounded is testamentary, where there is no local statute regulating the execution of wills.¹

In the United States as well as in England the testamentary character of a document depends on its substance and not on its form,² except so far as that depends on statute.³ In analogy to the cases just referred to, a Scottish deed of disposition and settlement and a letter⁴ have been admitted to probate here. Even a joint or conditional will is valid in the United States though, *semble*, not in England.⁵

Husband and wife may, under a power, make a joint will which is not revocable by either separately. An instrument intended to be a joint will by any other two is sometimes enforced in equity as a mutual contract.⁶ When it is thus enforceable, it is not voluntary, and consequently does not operate as a will properly so called.

A republication of a will by a codicil makes after acquired lands to pass in those States where a will of land speaks from the date of execution. For, a will and codicils thereto are to be construed together as one instrument.⁷ A like rule prevails in respect to a will and documents incorporated therewith by reference.⁸ Legacies adeemed or satisfied, however, are not revived by a re-execution of the will with codicils.⁹

¹ *Thompson v. Browne*, 3 My. & K. 32.

² *Carle v. Underhill*, 3 Bradf. 101.

³ *Matter of Easton*, 6 Paige, 183.

⁴ *Morrell v. Dickey*, 1 Johns. Ch. 153.

⁵ *Ex p. Day*, 1 Bradf., 476.

⁶ *Dufour v. Pereira*, 1 Dick. 419.

⁷ *Westcott v. Cady*, 5 Johns. Ch. 343.

⁸ *Jackson v. Babcock*, 12 Johns. 389.

⁹ *Langdon v. Astor*, 16 N. Y. (3 Smith) 9.

§ 3. *Revocation.*

A will or codicil is not necessarily a revocation of a prior will,¹ and if the codicil is expressed to alter the will in one particular, the presumption is that it confirms and republishes the rest of the will.²

A will that expressly revokes all former wills, or that disposes of all the testator's property, acts as a revocation of all former wills.³ Otherwise, the second will is only a revocation *pro tanto*.⁴ As to implied revocation by marriage, see 2 New York Rev. Stat. 64, § 43. A contract to sell does not revoke a devise.⁵ A change in the testator's property by transfer operates as a revocation of the will only *pro tanto*;⁶ and a codicil only revokes a will so far as such revocation is absolutely necessary to give effect to the dispositions in the codicil. In other words, the presumption is against a revocation.⁷

By the New York Revised Statutes, if a will disposes of the whole estate, marriage and the birth of a child revoke the will, if either the wife or child survive the testator. Parol evidence is not admissible to rebut this presumption. But such evidence is admissible in those States which contain no statutory provision, expressly or impliedly, to the contrary.

In Pennsylvania⁸ and Delaware, marriage or an

¹ See *Jones v. Nicholay*, 2 Eng. L. & Eq. 591.

² *Quincy v. Rogers*, 9 Cush. 291; *Payn v. Payn*, 18 Cal. 291.

³ *Simmons v. Simmons*, 26 Barb. 68.

⁴ *Brant v. Wilson*, 8 Cow. 56.

⁵ *Knight v. Weatherwax*, 7 Paige, 182.

⁶ *Vandemark v. Vandemark*, 26 Barb. 416.

⁷ *Kane v. Astor*, 5 Sandf. 457; *Westcott v. Cady*, 5 Johns. Ch. 343; *Wright v. Method. Epis. Church*, 1 Hoffm. Ch. 222; See *Howland v. Union Theolog. Seminary*, 5 N. Y. (1 Seld.) 193.

⁸ *Tomlinson v. Tomlinson*, 1 Ashm. 224.

after-child not provided for, is a revocation *pro tanto* only. In Ohio, Indiana, Illinois, and Connecticut, the birth of a child avoids the will *in toto*.¹

The will of a *feme-sole* is revoked by marriage. A devise is revoked by a sale of the land: all other specific gifts are revoked if the subject matter is assigned.²

By the statute laws of Maine, Vermont, New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Ohio, and Alabama, a posthumous child, and, in all of these States, except Delaware and Alabama, children born after the making of the will, and in the lifetime of the father, will inherit as if he had died intestate, unless the will comprises some provision for them, or they are particularly referred to in it.³ The will is thus revoked *pro tanto*. The statute law in Maine, New Hampshire,⁴ Massachusetts, and Rhode Island, goes further, and gives the same relief to all children and their legal representatives who have not been provided for in the will or previously advanced, unless the omission in the will appears to have been intentional. In Virginia and Kentucky, the birth of a child after the will, if there were none previously, revokes the will, unless the child dies unmarried or an infant. If the testator had children previously, the birth operates as a revocation *pro tanto*. In Virginia a will is also revoked by marriage.⁵

¹ See *Coates v. Hughes*, 3 Binney, 498; 4 Kent's Comm. 526, note. Statutes of Ohio, 1831, p. 243; Statutes of Conn. 1821, p. 200; Statutes of Ill. 1829; Statutes of Indiana, 1821; Digest of Rhode Island, Statutes, 1798, p. 282, 6 Haris. & Johns, 54; New York Rev. Stat. vol. II, 66, § 52; Mass. Rev. Stat. 1836, part. 2, tit. 3, c. 62.

² See *Infra*, chapter 24, § 3, on "the ademption of specific legacies."

³ 4 Kent's Comm. 525.

⁴ *Gage v. Gage*, 9 Foster, 533.

⁵ Rev. Stat. 1849, tit. 33, ch. 122, § 4; 4 Kent's Comm. 526.

In *Marston v. Roe*,¹ it was held that a will making no provision for the future birth of a child, although it did for a future wife, was revoked by the birth of a child, and parol evidence was not admitted to rebut this presumption.

By the New York Revised Statutes, if the whole estate is disposed of by the will, it is revoked by marriage and the birth of a child, if the wife or child be living at the time of the testator's death, unless the issue be previously provided for.

§ 4. *Conflict of testamentary laws.—What law prevails?*

Wills of personalty were not in England required to be in writing until 1838.² By that act, wills of personalty are required to be written and executed with the same formalities as wills of land. Similar uniform rules likewise prevail in most of the United States.

A will operates according to the laws in force at the time of the testator's decease, and not at the time of making the will.³ Statutes prescribing the effect of wills, however, should not be construed to have a retrospective effect⁴ unless this is expressly provided for in the enactment. A statute enacted between the date of the will and that of the testator's death may also indirectly operate on the will.⁵ *Aliter* in New York if the testator's death occurred before the passing of the Revised Statutes.⁶ In *Thomson v. Livingston*⁷ a will, which took

¹ 8 Ad. & El. 14.

² 1 Vict. c. 26.

³ *Adams v. Wilbur*, 2 Sum. 266.

⁴ See *Carroll v. Carroll*, 1 How. 275.

⁵ *Sherman v. Sherman*, 3 Barb. 385.

⁶ *Price v. Brown*, 1 Bradf. 291.

⁷ 4 Sandf. 589.

effect before the passing of the Revised Statutes and created a trust with power to a son to appoint by will, was construed in conjunction with the son's appointment to be altogether but a single will as regarded the validity of the final disposal of the property according to the provisions of the Revised Statutes.

It has been decided that a testator by adding a codicil, after the Revised Statutes, republished his will and subjected its construction to the Revised Statutes.¹ These enactments do not apply to wills made previously nor to wills of testators domiciled abroad or in other States.²

Seem, a republication by codicil in England does not bring the will under the operation of an act passed after the will and before the codicil. At least such seems to be the rule of law as regards the Dower act.³

The probate of a will by the statutory courts in England or the United States is conclusive evidence that the document is testamentary. Yet, a trust may be saddled by parol on a testamentary gift obtained by fraud; and a court of law or equity may also construe the will so as to render it wholly or in part inoperative, or may deem it void as not being in conformity with the law of the testator's domicile.

Prior to the establishment of statutory courts in England and the United States, the ecclesiastical courts in England, and the analogous courts here, gave no conclusive probate of wills of realty, but only of personalty. The statutory courts, however, have generally equal jurisdiction as regard both descriptions of property.

¹ *Salmon v. Stuyvesant*, 16 Wend. 321.

² *Matter of Roberts*, 8 Paige, 446.

³ See *Hawkins on Wills*, p. 272.

§ 5. *Domicile.*

Jarman¹ considers that a will of realty is construed according to the law of the country where the land is situate. But Story,² Greenleaf,³ and other writers,⁴ are of opinion that this doctrine of the *lex rei sitæ* does not apply to the construction, as distinguished from the execution, of wills. Several American authorities may be cited in favor of either position.⁵ The balance of decisions, however, is greatly in favor of Jarman's view. It would seem, in point of principle, that as a will of realty was formerly construed as a quasi-conveyance, there is much reason to contend that the domiciliary law ought not to attach to devises. But, on the other hand, as wills are of an equitable origin, and, therefore, when made abroad, are like articles or contracts entered into in a foreign country, there are at least equally strong reasons for holding that devises ought to be construed according to the law of the testator's domicile. A will is presumed to be made *in extremis* by a person in want of counsel. Why should he be presumed to know the law of the *rei sitæ* rather than that of his domicile? However, existing authority is strongly to the effect that devises are governed by the *lex rei sitæ*.⁶

Yet, in *Harrison v. Nixon*,⁷ it was held that wills are to be construed according to the laws of the testator's domicile, especially as regards personalty, unless the

¹ Vol. I, 1.² Conflict of Laws, § 479 h.³ Ev. § 671.⁴ 1 Jarm. Am. Ed. p. 3, note.⁵ See *Trotter v. Trotter*, 3 Wils. & Shaw. 407; see 1 Redfield on Wills, chap. 9, § 2.⁶ See *Lynes v. Townsend*, 33 N. Y. 558.⁷ 9 Pet. (U. S.) 483; see *Enohin v. Wylie*, 10 H. Lds. Cas. 1.

context provides to the contrary. In New York, too, the *lex domicilii* governs as to the validity and construction of wills of realty,¹ and the same points have been so decided in most of the other States.

Seem, the law of the testator's domicile will govern as to what is to be deemed real and what personal. Jarman² considers that the law of the testator's domicile governs only movables, and does not apply to leaseholds, which are not movables in the civil law. This opinion seems sound. See, however, *Jerningham v. Herbert*.³ The decision of a court of the domiciliary nation, at all events, is conclusive in a question of the validity or revocation of a will, only as regards the testator's personalty, and not his realty, situate outside of that jurisdiction.⁴

The essentials of domicile are habitation, *animo manendi*; in other words, a *permanent home*, or a home with the intention of keeping it, or of returning to it. Sometimes, where a person lives half the year in one state and half in another, it is difficult to determine the domicile. The question is one of fact for a jury.⁵

With regard to moveable property, it is distributed on intestacy according to the domiciliary law. If the testator changes his domicile after making his will, and it is invalid according to the law of his new domicile, it was formerly supposed to be avoided, except that if he resumed a domicile in the nation where the will was made it was thereby revived.⁶ But it was decided in *Exp. M'Cormick*⁷ that a foreign will of personalty,

¹ *Bloomer v. Bloomer*, 2 Bradf. 339.

² Vol. I, 3 note.

³ 4 Russ. 388.

⁴ *Bloomer v. Bloomer*, 2 Bradf. Sur. 339.

⁵ See *Round on Domicile*, *passim*; *Potter v. Titcomb*, 22 Maine, 300.

⁶ *Story Conf. Laws*, § 473; 2 Greenl. Ev. § 668.

⁷ 2 Bradf. 169; *Isham v. Gibbons*, 1 Id. 69; but see *Parsons v. Lyman*, 20 N. Y. (6 Smith), 103; *Mooltrie v. Hunt*, 23 N. Y. (9 Smith), 394.

duly executed at the testator's domicile according to the forms there required, remains valid, although he changes his domicile to a place where a different mode of execution is required.

The domicile of origin remains until changed. The domicile of a mother, *semble*, is the domicile of her children, if their father is deceased. When a domicile is once acquired, it continues until it is again actually changed. An intention to remain is necessary for a domicile of acquisition; but an intention to change is not sufficient to alter a domicile until it is actually changed. Therefore, death *en route* does not alter domicile.¹ Domicile, when acquired, is the result of a voluntary act; consequently, imprisonment abroad does not alter domicile, but a permanent residence there has this effect, even though the testator is a trader, and, as such, is protected by treaty with his native country.²

The fact of domicile is part of the *res gestæ*. Any question relating to the testator's domicile is, therefore, open to parol evidence.³

Although foreign laws are proveable as facts, yet this evidence is addressed to the court, and not to the jury. The evidence of foreign experts may be taken by the courts. If no evidence is known to them of the foreign laws being different from their own, they will presume that no such difference exists.⁴

§ 6. *Capacity to will.*

Although questions of capacity are not directly connected with rules of construction, yet, a few remarks on testamentary capacity will not be wholly irrelevant.

¹ State v. Hallett, 8 Ala. 159.

² Moore v. Budd, 4 Hagg. 346.

³ Wilson v. Terry, 9 Allen, 214.

⁴ McClellan v. Kennedy, 8 Maryland, 230.

Indeed, questions of accidental, not personal, disability, such as fraud, undue influence, as distinguished from nonage, insanity, or coverture, are indirectly connected with rules of construction, inasmuch as fraud sometimes does not extend to the whole instrument, but merely to a part thereof, and the overthrow of a part of a will often materially affects the construction of the remainder.

At common law, females at twelve and males at fourteen might dispose of personalty by will. The first English statute of wills, 32 Hen. VIII., ch. 1, § 14, required testators of realty to be of age, and the statute 34 and 35 Hen. VIII., ch. 5, incapacitated females. The 1st Vict., ch. 26, has extended the requirement of full age to all testators, male and female. A similar law now prevails in most of our States.

The day of one's birth is included in computing his legal age; therefore, as the law regards no fraction of a day in legal computation, a person born on the first of January, 1850, attains majority on the first moment of first January, 1871.

The domiciliary law governs as to testamentary capacity. In New York males of eighteen and unmarried females of sixteen may bequeath personal estate.¹ The testamentary capacity of married women, as to personality, is in effect taken away by the section referred to.² The married woman's Act of 1848 conferred no testamentary capacity, but the Act of 1849 did.³

A married woman, whose husband is not civilly dead, cannot by the law of England make a will, either of real or personal property, except of personal estate settled to her separate use, or under a power⁴ or by her

¹ Rev. Stat. 60 § 21.

² *Wadhams v. Am. Home Mission Soc.* 12 N. Y. (2 Kern.) 415.

³ *Waters v. Collen*, 2 Bradf. 354.

⁴ *Holman v. Perry*, 4 Metcalf, 492.

husband's specific permission,¹ or else as executrix. In this last capacity she can make a will, without her husband's consent, of all assets not previously collected, and so far as she takes no interest in them. A will made by her with consent of her husband is void, unless the consent be to the particular will (in the concrete) in question, and unless the husband survive her. But a will of her separate personalty, or of her realty under a power, is independent of the husband's consent or survivorship.

The laws of the different States vary much in respect to testamentary capacity.

As to wills of married women operating as executions of powers, see *Matter of Stewart*.²

An alien's will of land is voidable only, and not void until office found. Aliens, however, may make valid wills of personalty.³ Alien enemies are disqualified from doing so, unless they have a license from our government to reside here. As to the privileges of aliens, see further 2 Kent.⁴ Their rights are now greatly modified by the laws of the different States, and possibly also indirectly by conventions formed by the Federal Government with foreign nations.

At common law, testamentary capacity was destroyed by treason and felony. But this rule of the common law is now either abolished or greatly modified in most of the States.

Testamentary capacity is proved by evidence that the testator knew what he was doing, even though his general business capacity was impaired.⁵ Persons whose

¹ *Hood v. Archer*, 1 McCord, 225.

² 11 Paige, 398.

³ See 2 Kent, 61, 5th ed.

⁴ Comm. 70, 71, 5th ed.

⁵ *Converse v. Converse*, 21 Vermont, 168; *Kinne v. Kinne*, 9 Conn. 102; *Stewart v. Lispenard*, 26 Wendell, 255.

reason is disordered, or who are drunk, are incapacitated from making a will. But partial intoxication does not work a complete disqualification to will.¹ The burden of proof of testamentary capacity is supposed to rest on the person propounding the will. The attesting witnesses are competent to prove a want of testamentary capacity.²

The declarations of a testator are evidence of his testamentary capacity, and also of the question whether the will has been obtained from him fairly, or by undue influence. On principle, there seems to be no ground for rejecting, as regards fraud, the testator's declarations made after the date of the will more than those made before it was executed.³ On the question of capacity, see further, *Davis v. Calvert*.⁴ On a question of capacity, the contents of the will and the whole state of the testator's affairs and conduct are relevant subjects for evidence.

Various classes of persons are in England deprived by statute of rights under wills. In America no such disqualifications exist.

A devise to a witness to a will formerly avoided the will unless it had three witnesses. By the present English law,⁵ which has been adopted in most of the United States, the will is now valid, but the legacy is void. According to the old rule, if the legacy was adeemed, the witness was restored to competency in England,⁶ but not in America.⁷

¹ See *Lowe v. Williamson*, 1 Green Ch. 85, et seq.

² *Whitenach v. Stryker*, 1 Green Ch. 11.

³ See *Waterman v. Whitney*, 1 Kernan (5 N. Y.), 157; notes to Proposition Seven in Sir James Wigram's treatise.

⁴ 5 Gill and Johns. 269, 301.

⁵ Stat. 25 Geo. II. c. 2; stat. 1 Vict. c. 26.

⁶ *Windham v. Chetwynd*, 1 Burrow, 414.

⁷ *Hawes v. Humphrey*, 9 Pick, 350; *Cornwell v. Isham*, 1 Day's Rep. 35, 41, and note.

A devise to the husband or wife of a witness avoids the will, yet a devise to a child of the witness has not this effect.¹ But if the witness, as a non-resident or otherwise, is not required to establish the will, a legacy to him does not invalidate it.²

An alien friend may take a bequest, but not a devise, nor even a bequest so far as it is derivable from land. An alien enemy, or a citizen domiciled in the country of an alien enemy, cannot take either a bequest or devise. A felon, in England, forfeits to the crown all rights of action accruing to him until his term of punishment is ended; but he forfeits nothing that accrues to him afterwards. The law of forfeiture varies much in the different States.

Bequests made in the Southern States during the civil war are valid, unless tainted with a want of allegiance.³

Devises to foreign corporations are valid, unless reasons of special policy, such as the discountenancing of slavery, are in question.⁴

§ 7. *Period by reference to which a will is construed.*

A will has always been presumed in England to speak only from the death of the testator, as to personality; but in that country before 1838, a will spoke from its date as to realty. By 1st Vict. c. 26 devises and bequests both speak only from the death of the testator, unless a contrary intention appears. The rules thus settled by this act have long been adopted in most

¹ *Allen v. Allen*, 2 Overt, 172.

² *Cornell v. Woolley*, 3 Keyes (N. Y.), 378.

³ *Corbett v. Nutt*, 18 Gratt, 624.

⁴ *Wade v. Colonization Society*, 7 S. and M. 663.

of the United States,¹ either in consequence of a statute or by construction.

The old rule as to devises of land implied that they were conveyances in certain respects. Therefore, if the testator parted with his seisin but for an instant, it operated as a revocation of a previous devise thereof.

The date of a will is perhaps the natural period with reference to which the will should be interpreted, although the operation of a will, as of a deed, doubtless can date only from its complete execution. Wills of personalty, however, and of realty in England and several of the United States, are, as already stated, presumed not to operate previously to the death of the testator.

A will is presumed, in the following States, to speak only from the date of the testator's death, as regards the subject matter (as distinguished from the objects) of the testator's bounty:—Maryland, Missouri, New York, and Pennsylvania.

In Virginia, wills of land speak from the making of the instrument, unless it discloses an intention to the contrary.² A similar law obtains in Massachusetts,³ New Hampshire,⁴ Vermont, Indiana, Maine, North Carolina, Connecticut, Illinois, and Kentucky,⁵ though a testator may in these States convey by his will any after-acquired land, provided he declares an intention to that effect.

The construction put on the will statutes of these States, however, virtually raises a presumption that wills speak only from the death of the testator,⁶ if there is nothing in the context to the contrary.

¹ See *Gold v. Judson*, 21 Conn. 616, 622.

² *Smith v. Edrington*, 8 Cranch, 66.

³ Mass. Gen. Stat. c. 92, § 4; *Prescott v. Prescott*, 7 Met. 141, 146.

⁴ *Whittemore v. Bean*, 6 N. H. 47; Rev. Stat. N. H. 1842, ch. 156,

§ 2.

⁵ See 4 Kent's Comm. 510, *et seq.* ⁶ *Cushing v. Aylwin*, 12 Met. 169.

Specific legacies usually point to the date of the will,¹ general legacies to the death of the testator.

The words "now," "now living," refer to the date of the will. But the present tense of verbs has not always this signification; therefore "all I am possessed of," or "all my debts," and similar residuary clauses, refer to the time of the testator's death.² The meaning of the word "now" will not be affected by the absence of a date to the will,³ since the date of any instrument, being part of the *res gestæ*, is open to parol evidence.⁴ In the case of *Allsouls' College v. Codrington*,⁵ a testator bequeathed a library of books, "now in the custody of B." After-bought books were held to pass. The gift was, as it were, of a class of books.

It is often exceedingly difficult to determine whether a testator intended that a particular clause in his will should speak from its making or from a future date. The words "now living," however, or the present tense of the verb used, may, as already noticed,⁶ aid the interpretation. The substance of the disposition, and the context, are the best guides in this respect. Parol evidence, of course, is wholly inadmissible. Such evidence never relates to the willing or directing function, but only to the subject or object of gift.

Specific bequests imply that the dispositions speak from the date of the making of the will. On this principle rests the doctrine of the ademption of such gifts. Jarman⁷ thinks that in those States where a will speaks from the death of the testator, a specific gift will not

¹ *Cockran v. Cockran*, 14 Sim. 248.

² *Wilde v. Holtzmeyer*, 5 Ves. 811.

³ See *contra*, *Cole v. Scott*, 16 Sim. 259.

⁴ *Deakins v. Hollis*, 7 Gill & J. 311; *Wright v. Wright*, 5 Ind. (Porter), 389. ⁵ 1 P. Wms. 597.

⁶ 1 Jarman, 278; *Wilde v. Holtzmeyer*, 5 Ves. 811.

⁷ Vol. I. 290, *et seq.*

be considered to have been adeemed if the testator has re-acquired some other property that suits the description in the will. But there is no reason whatever to suppose that the 1st Vict., c. 26, and the analogous American statutes, are intended to make any change in the law of the ademption of specific testamentary gifts, since, indeed, the doctrine of ademption applies to bequests of personalty as to which a will always spoke only from the time of the testator's death, unless the will itself provided to the contrary.

§ 18. *Interests Disposable by Will.*

The English law down to 1 Vict., c. 26, required that a testator should be seized of any land he devised. This rule still prevails in a few States.¹ But, the New York Revised Statutes² make all descendible estates devisable. The same law prevails in Massachusetts, Vermont, Pennsylvania, and Virginia. In Ohio there is the general and most salutary provision by statute, that every kind of property may be devised. The testamentary power in the United States may therefore be considered as virtually the same as, or rather more extensive than, that which exists in England. The test in the latter country is the question whether the interest is a possibility coupled with an interest. In the United States the test usually is whether the interest is descendible.

All interests, however, if vested, or executory, or consisting of rights of entry or of action, are devisable in most of the States,³ and in England since 1838. So are all possibilities coupled with an interest.⁴ Bare possibili-

¹ 4 Kent's Comm. 512.

² Vol. II. 57, § 2, 5.

³ Smithwick v. Jordan, 15 Mass. 113.

⁴ Den v. Manners, 1 Spencer, 142.

ties, however, although descendible, are not devisable in some of the States, although the common test of what is devisable is the inheritable quality of the interest in question.¹

The possibility that the estate of a certified bankrupt may be restored to him by means of a supersedeas, by an arrangement with his creditors or otherwise, is not such a possibility coupled with an interest as will enable him to transmit the estate by a general devise of present and after-acquired property.² In New York, however, a testator may devise lands in the adverse possession of another, who holds under a sheriff's sale thereof, as the property of one who had no title.³ Indeed, it would seem unsafe at the present day to hold that any interest or possibility not acquired tortiously is not devisable in any of the States, since statute law has made sad havoc upon the venerable but thorny boundaries of the common law ; and equity is bound to follow the genius of legislation.⁴

In those States where a devise of land speaks only from its date, the equitable or legal interest alone may pass, while the correlative interest, if after acquired, descends to the testator's heir. If a testator has not entered into a contract, valid either in law or equity, for land, and has no real estate, his devisee of land takes nothing, and is not entitled to have any personality applied to purchasing land⁵ in order to render the devise operative.

Terms of years and estates, *par autre vie*, limited to

¹ Jackson v. Varick, 2 Wend. 166 ; 4 Kent's Comm. 512. See Smith v. Jones, 4 Ohio, 115.

² Estate of Morris, Dist. of Pa. Crabbe, 70.

³ Waring v. Jackson, 1 Pet. 570.

⁴ See 4 Kent's Comm. 206, 207 ; Jackson v. Waldron, 13 Wend. 178, 4 Wash. C. C. 570.

⁵ 2 Williams Ex. (2d Am. ed.) 1251, 1253.

the lessee and his executors (not heirs) vest as chattels real primarily in the executor. They are devisable, like ordinary personalty, and the testamentary power over them is not embarrassed with any question of tenure or seisin. A quasi entail of land held *par autre vie*, it seems, may be barred by a deed, surrender, or articles, but not by will. There is no reason, however, why it should not be barrable by will. It does not fall under the principle of recoveries, and the fiction of a recompense to the issue. It may be barred *inter vivos* directly. Why should not the remainder man be equally barrable, and, where there is no fictitious equivalent, why should a will be deemed a conveyance inferior to articles? The law on this point does not appear to be settled in the United States. It will therefore, probably be determined finally in analogy to principle. Even in England the question cannot be considered concluded.

Estates *par autre vie*, and renewable leaseholds containing covenants for perpetual renewal are much more common in Ireland than in England or the United States. They are likely, however, to become here in the progress of society a more usual form of lease than is the case at present.

The will of a joint tenant is void, unless he survives his co-tenants. Even then it will pass only the landed interest he had at the time of making the will, if made in England before 1 Vict., c. 26, or in any of the States now where wills of realty speak from their date. As joint tenants were at common law seized *per tout* as well as *per mi*, it is strange that their will could not pass the *jus accrescendi* prospectively. Yet such was the law. At present, however, where a will speaks from the death of the testator, unless the context provides to the contrary, after-acquired interests pass by the instrument.

CHAPTER II.

GENERAL PRINCIPLES OF TESTAMENTARY CONSTRUCTION.

§ 1. *Principles of American adjudication.*

As equity bears an analogy to law in its deductions, though not in its data, so the American law of wills may be regarded as an equitable interpretation of the correlative English rules. A knowledge of these is, consequently, necessary for the practitioner here. But he should regard them as guides, and not as masters. Their philosophy and sense bind our courts, but not their occasionally technical rigidity and frequent close similarity to rules governing the construction of deeds. The American tribunals, therefore, will be guided by the English cases only as regards leading principles. The English authorities will afford grounds for presumption and rules for direction; but the least positive evidence to the contrary in a will must generally, if not, indeed, always, neutralize in America any mere rule of common-law construction.

The *general* rules relating to the construction of wills are, however, in the main, the same in the United States as in the United Kingdom. The leading exceptions appear to be—1, the rule in Shelley's case is not so strictly followed in the United States; 2, construction *cy pres* is not usually adopted in behalf of charities; and 3, *semble*, precatory trusts are not so readily enforced; while, 4, parol evidence is more freely admitted. The

last exception, however, is daily becoming more and more curtailed.¹

It is a settled rule of interpretation in the Supreme Court of the United States, as regards titles to property in the different States, to follow the statutory and unwritten laws of such States.² But, on the construction of wills, the Supreme Court takes independent ground, and may disregard the decisions of State courts.³ In *Cornish v. Wilson*,⁴ on the other hand, the court considered the case of *Fenwick v. Chapman*⁵ to be erroneous, and held that the decisions of the Supreme Court of the United States, construing the local laws of Maryland, are not conclusive authorities for the State courts.

The courts seem to take for guides in construing a will—1, decided cases; 2, rules of law; 3, rules of testamentary construction; 4, the whole text of the will; and 5, the particular passage. These are the main helps to the construction; and, though equally necessary to be considered, their relative practical force is perhaps in the order mentioned. But, as precedents rarely apply to wills drawn by laymen, and as the context predominates over common law rules of construction, it is in the grammatical sense of the whole document that the key to the difficulties of testamentary interpretation is most usually to be found.

§ 2. *Precedents.*

The first rule of testamentary construction, however, is that courts must abide by decided cases.

To these any supposed intention of the testator to

¹ *Ruston v. Ruston*, 2 Dall. 244; *State v. Nicols*, 10 Gill. & J. 27; *Inglis v. Trustees of the Sailors' Snug Harbor*, 3 Pet. U. S. 117, 118.

² *Pollard v. Dwight*, 4 Cranch, 429.

³ *Lane v. Vick*, 3 How. U. S. 464.

⁴ 6 Gill, 299.

⁵ 9 Pet. U. S. 461.

the contrary must give way. Therefore, where a long series of decisions has attached a fixed meaning to certain phrases, such meaning, and not the popular sense of the terms used, will be adopted by the court,¹ unless the context is clear to the contrary.² Precedents, however, have paramount weight in a testamentary cause only when they are strictly analogous.³

§ 3. *Rules of law.*

With respect to rules of law, such as fall properly within the scope of this work will be found discussed in the chapter on void testamentary gifts.

§ 4. *Rules of construction.*

The rules that regulate the construction of wills are almost identical with those appertaining to contracts, or executory articles, as distinguished from final conveyances. Indeed, where a legal phrase occurs in a will, it will be construed exactly as if it stood in a deed, provided that the testator does not in some other part of the will show an intention that the legal phrase is not to be understood in its technical sense. Accordingly, Sir Edward Coke says, of the relations of testamentary to common law, "I have learned this good rule, always to judge, in respect to wills, as near as may be to the rules of law."⁴

¹ *Brown v. Lyon*, 6 N. Y. (2 Seld.) 419; *Kingsland v. Rapelye*, 3 Edw. 1.

² *Bradhurst v. Bradhurst*, 1 Paige, 331; 1 Abb. N. Y. Dig. 381; *Lambert v. Paine*, 3 Cranch, 134; *Carr v. Porter*, 1 McCord, c. 71, 72; *Ide v. Ide*, 5 Mass. 501.

³ *Lyon v. Acker*, 33 Conn. 225.

⁴ 1 Bulst. 130.

Almost all rules of interpretation, not of a restrictive nature, that are applicable to deeds, equally apply to wills. For instance, the maxim that a document may be incorporated in a deed by reference, is equally applicable to a will. The manuscript referred to, so far as its contents are adopted by the will, becomes thus part and parcel thereof, and is supposed to be executed when the will itself is completed with due ceremony.

The maxim that the exclusion of one person or thing is the inclusion of another, is also often acted upon by the courts when interpreting wills. Therefore, if a younger child is excluded from a share by reason of his becoming elder before a given period, his becoming an eldest child afterwards does not deprive him of his share. A little observation applies to the converse doctrine, that the inclusion of one is the exclusion of another; and, indeed, to every rule of interpretation applicable to contracts as distinguished from conveyances at common law.

But, doctrines of tenure, and restrictive or technical rules of construction, such as the necessity for using the word "heirs" in order to pass a fee, do not apply to wills. The benignant principles used for interpreting deeds are still more liberally applied to wills. But the negative and restrictive rules that fetter the construction of the former class of instruments are not strictly enforced in respect to wills. Testamentary construction, properly so called, therefore, relates to those technical rules, which the courts, when expounding wills, do not wholly ignore, but modify; as, for instance, when they interpret the phrase "heirs of the body" to mean first and other sons taking by purchase.

A *cy pres* construction is sometimes applied to deeds, in order to exclude a false demonstration, or to impart certainty to a seemingly uncertain gift. Yet the

peculiar testamentary rule usually termed *cy pres* is inapplicable to deeds. In these instruments a fee tail can only be created by the express words "heirs of the body," or the few other phrases that have a similar legal significance.

A *cy pres* construction, indeed, is also deemed inapplicable to personalty and to estates in fee simple, though if the doctrine be rightly expounded in *Pitt v. Jackson*,¹ this limitation of its scope is contrary to analogy, if not to strict principle. This restriction of *cy pres* construction, however, as settled by decided cases, indicates the true key to the nature of testamentary limitations. They are essentially executory, or contractual, and will be construed as such, although some of the parties has an "equity," properly so called, or anything more than a strict legal right, such as that for which, if it arose under a contract, a court of law would give damages, but equity would give no specific relief. The executory character of a claim under a will, however, is not one of a definite nature, such as arises under marriage articles where the intention of the framer of the articles is undoubted. Therefore, the rule in *Shelley's* case is applied more freely under wills than under marriage articles. But the essence of the claim is still executory, so far as that the text of the will is construed by the courts just as if the document were a contract in equity.

Words are taken strongly against the grantor in a will as in a deed. Hence have sprung the rules which authorise the transposing or implying of words, and which favor the vesting and indefeasibleness of estates. The rights of the heir are only considered with extreme favor when the question arises between him and the

¹ 2 Bro. C. C. 51; *Routledge v. Dorril*, 2 Ves. Jun. 357.

residuary devisee on account of a partial failure of the testator's disposition, or else is a remote result of that disposition, as when the contest is between the heir and the next of kin under a trust to convert. Indeed, if the direction relate to personalty, the next of kin retains any portion not required for the purpose for which conversion is directed. The heir is favored only in respect to rules of law and incidents of property, but not in respect to rules of construction.

An instrument may operate as a deed in one part and as a will in another.¹ As to the distinctions between a deed and a will, see *Meek v. Holtom*.²

Nevertheless, general rules for the construction of wills, no matter how philosophically compiled these rules may be, cannot be of the same degree of use as rules for the construction of deeds. The strict demand of the law for formal conveyancing *inter vivos* produces a corresponding supply of drafts, which, as a rule, vary only within definite limits from the prescribed models. But the necessary liberality of the law in construing wills has opened the flood-gates of legal chaos; and both the religious and the secular purposes of the testator are often wholly defeated in the subsequent confusion. Yet testamentary rules are not without their uses; first, as regards all well-drawn testaments, and secondly, because such instruments, even when prepared by ignorant persons, abound with technical phrases copied from deeds. It is to be remembered, however, that in the case of every will, whether well or ill drawn, the intention of the testator, as expressed in the document, will be sought to be effectuated in a more liberal way than if the draft were one *inter vivos*.

¹ *Robinson v. Schley*, 6 Geo. 515; *Taylor v. Kelly*, 31 Ala. 59.

² 22 Geo. 491; *Babb v. Harrison*, 9 Rich. Eq. 111.

No general rule of construction, therefore, when applied to a clause in a will, is without its exception, if the context is sufficiently strong to the contrary. This is always allowable in a will, though not in a deed. General rules, therefore, general words, and particular terms, are all controlled by the guiding star of the testator's lawful intent,¹ which varies in almost every particular case. The only perfect barrier against litigation under a will is a case exactly or essentially in point. Case law is thus virtually the whole of testamentary jurisprudence.

A will, statute, or other document, is construed according to the primary sense of the words used, except where a rule of law, the context, external circumstances, or a rule of construction is inconsistent with such interpretation.²

As, then, the words in a will must, under the conditions just specified, receive their primary or grammatical import,³ an heir-at-law will not be disinherited,⁴ a common law estate will not be construed an executory devise,⁵ a vested estate will not be construed as contingent,⁶ nor will the primary liability of the personalty to debts⁷ be shifted, unless such is the manifest and undoubted intention of the testator. General legacies, too, are favored rather than specific ones.⁸

Whether an adjective in a will refers to the last substantive or not depends on the intention of the testator.

¹ *Wylie v. Wylie*, 1 De. G. F. and J. 410; s. c. 6 Jur. N.S. 259.

² *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Grey v. Pearson*, 6 H. L. Cas. N. S. 61.

³ *Annable v. Patch*, 3 Pick. 363.

⁴ *Hayden v. Stoughton*, 5 Pick. 536.

⁵ *Hawley v. Northampton*, 8 Mass. 37.

⁶ *Dingley v. Dingley*, 5 Mass. 535.

⁷ *Seaver v. Lewis*, 14 Mass. 87.

⁸ *Foute App.* 22 Pick. 302; *Briggs v. Hosford*, 22 Pick. 289.

The general rule that the reference is to the last antecedent is inapplicable to a description consisting of several particulars.¹ In such cases the reference generally qualifies the whole series.²

Punctuation may be regarded as a guide to the construction when no other means of solving an ambiguity can be found. But if itself is the source of the ambiguity, it is then unimportant,³ and will not be suffered to confuse a construction otherwise clear.

These observations apply to wills the meaning of which is sensible or applicable in several different senses to the testator's circumstances. For the rules regulating the admission of parol evidence, where the will is not in any primary sense of its terms applicable to the testator's circumstances, the reader is referred to the preceding treatise.

§ 5. *Intention.*

The intention of the testator, indeed, is often said to be the polar star to the interpretation of his will.⁴ The testator may make his glossary in the will itself, and define the terms he employs.⁵ His directions, however, it is to be remembered, cannot contravene a rule of law, as that a tenant in tail is not to have power to disentail the land, or that a tenant in fee is not to alien it. It is the legal, not the actual intention of the testator, therefore, which is the key to the construction of his will.⁶ *Lasher v. Lasher*⁷ is no authority to the contrary, as it

¹ *Hunter v. Hunter*, 17 Barb. 25, 85.

² *Ib.*

³ *Sweet v. Geisenheimer*, 3 Bradf. 114; *Arcularius v. Geisenheimer*, 3 Bradf. 64.

⁴ See *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Mutter's Estate*, 38 Penn. 314; 4 Kent's Comm. 535

⁵ 4 Kent's Comm. 535, note; see 11 Moore's P. C. C. 526.

⁶ *Martindale v. Warner*, 15 Penn. 471.

⁷ 13 Barb. N. Y. 106; see *Robertson v. Johnston*, 24 Geo. 102.

applies merely to the mode of creating an estate, and not to determining its permanent incidents.¹

The lawful intent of the testator, however, as to each gift or power is, in practice, the cardinal rule for the construction of wills. To that intent, all inconsistent and incongruous expressions must yield.² But the intent is often to be inferred, not from a part of the instrument, but from the whole of it.³

The intent is to be gathered from the will only.⁴ But the whole document will be considered in its bearings upon each clause, and effect will be given to each of the dispositions unless it is entirely repugnant to some other clause.⁵ The clause which least effectuates the testator's general intention will then be expunged.⁶ If both are equally important, the latter prevails. The introductory clause is a good key to the intention, provided there is an actual clause corresponding with it.⁷ Sometimes, even without an actual disposition, the introductory clause operates as much by implication.⁸ A subsequent clause, referring to a supposed preceding provision, which, however, is not in the document, will often, too, amount to a disposing clause by implication.⁹ So, if a clause will not be reasonable unless it be supposed the testator intended to make a corresponding disposition of other portions of his property, such dispositions will be implied.¹⁰

¹ See *Stockes v. Tilly*, 1 Stockt. N. J. 130.

² *Finlay v. King*, 3 Pet. 347; *Smith v. Bell*, 6 Pet. 68; *Lane v. Vick*, 3 How. 472; *Kip v. Kip*, 2 Pa. 366; *Byrd v. Byrd*, 2 Brock, 170.

³ *Ib.*

⁴ *Jackson v. Luquere*, 5 Cow. 221.

⁵ *Arculazius v. Geisenheimer*, 3 Bradf. 64; *Sweet v. Geisenheimer*, Id. 114.

⁶ *Kane v. Astor*, 5 Sandf. 467.

⁷ *Earl v. Grim*, 1 Johns. Ch. 494.

⁸ 18 Ves. 41; *Marsh v. Hague*, 1 Edw. 174.

⁹ *Hyatt v. Pugsley*, 23 Barb. 285.

¹⁰ *Rathbone v. Dyckman*, 3 Paige, 9.

The whole instrument has frequently thus to be considered when any part is under interpretation.¹

Yet, to pass a fee, an introductory clause will not be sufficient, where the words of the conveying clause do not in their ordinary import convey such an estate.² But if the introductory clause in a will indicates an intention on the part of the testator to dispose of his whole estate, this will render a subsequent general devise a fee, if there be a connection between the two passages.³ Unless there is such connection, only a life estate passes, except where the devise itself contains adequate words, or a local statute applies to alter the rule.⁴ The old rule, however, is thus altered by statute in several of the United States, so that a general devise of land, without any words of limitation, passes the testator's whole interest. A similar rule was established in England by 1st Vict. c. 26.

The testator's intent, however, is to be gathered not merely from the words used by him, but from the words as defined by the law of the land,⁵ or of his domicile, so far as the will relates to personalty.⁶ This rule is, after all, subject to any meaning imposed on his words by the testator, either directly or by the context. The rule, however, is valuable as showing that a technically-drawn will shall be construed technically, subject only to the testator's primary intention,⁷ of which no doubt the use of technical words is itself some

¹ *Kip v. Kip*, 2 Paine, 366 ; *Stanley v. Colt*, 5 Wall, 119 ; *Gardener v. Wagner*, Baldw. 454.

² *Wright v. Page*, 10 Wheat. 204.

³ *Van Derzee v. Van Derzee*, 30 Barb. N. Y. 331.

⁴ *Beall v. Holmes*, 6 Har. & J. 205 ; *Finlay v. King*, 3 Pet. U. S. 346.

⁵ *Pennyroy v. Sheridan*, 4 Bl. C. C. 316.

⁶ *Harrison v. Nixon*, 9 Pet. 483.

⁷ *Smith v. Bell*, 6 Pet. 68.

evidence. But no part of the testament will, if possible, be held void for uncertainty,¹ or overruled by another part. *A fortiori*, an express limitation is not controlled by implications drawn from other provisions in the will, if the latter can, by any fair intendment, be reconciled with the former.²

The presumption in favor of a technical use of technical words will also be sacrificed in behalf of the general intent.³ Thus, the word inherited may be applied to lands devised or conveyed by an ancestor.⁴

On the other hand, directions merely subsidiary to the general purposes of a will can rarely, if ever, have any influence on the general construction of the document.⁵

As the rules of law will govern where the construction is silent or ambiguous, it follows that a knowledge of conveyancing is just of as much use to the testamentary lawyer as it is to the practitioner in other branches. The power of the testator to override any rule of construction is unquestioned. But testators and their draftsmen do not always know how to apply this power. The result, therefore, is not unfrequently as in *Perrin v. Blake*,⁶ that they bind themselves hand and foot to common law rules.

With the exception, however, of doctrines relating either to parol evidence or to principles of public policy, every rule of construction referred to in these pages operates only where the context is silent or doubtful on the particular point in question.

Sailors' wills are in some respects exceptions to the

¹ *Kip v. Kip*, 2 Pa. 366.

² *Ward v. Amory*, 1 Curt. 419.

³ *De Kay v. Irving*, 5 Den. 646.

⁴ *McDonough v. Murdock*, 15 How, 367.

⁵ 4 Burr, 2579; 1 W. Blackst. 672.

⁶ *Ib.*

ordinary rules and presumptions by which the real intention is to be ascertained.¹

§ 6. *Distinct gifts.*

A testator is presumed to have an additional purpose for each additional expression² and to intend such a meaning as will give most effect to the context.³ Every clause, therefore, will, if possible, be so construed as to be rendered operative itself, and to allow the other dispositions to be operative also.

The rule that every clause in a will is to have some force, if possible, is well illustrated by an express charge of a mortgage debt on the land mortgaged. This express charge makes a devisee of the mortgaged land take it subject to the mortgage.⁴ Unless the personalty was thus exonerated, the clause referred to would have no force. But a construction which alters the relative liabilities of the heir and the executor gives the charge a peculiar force, which it would not otherwise have had.

So, a direction to pay debts implies that they are charged on the land, else the clause will be inoperative.⁵

Mortgaged land is at present in England, and in some of the United States, the primary fund for payment of the mortgage debt.⁶

Part of a void will, or of a provision therein, will be upheld, if it can be separated from the unsound parts consistently with the testator's general intention.⁷ To

¹ *Sherry v. Lozier*, 1 Bradf. 437.

² *Oddie v. Woodford*, 3 Myl. & Craig, 584.

³ 2 Jarm. 62; *Jobson's Case*, Cro. Eliz. 576; *Leigh v. Leigh*, 15 Ves. 92.

⁴ *Evans v. Cockeram*, 1 Coll. 428.

⁵ *Shallcross v. Finden*, 3 Ves. 737.

⁶ See *infra*, chapter nineteen, on "Charges on Land."

⁷ *Oxley v. Lane*, 35 N. Y. 340, Ct. of App.

such primary purpose a secondary intention, if inconsistent therewith, must always yield ;¹ and of two probable intentions that one will be adopted which prefers the kin of the testator to strangers.²

The courts, however, will follow judicial authority, and not conjectural interpretation, where the clauses in question are identical in language.³

§ 7. *Equitable interpretation.*

The construction of a will is in the main the same at law as in equity. The Court of Chancery has always in England supplied, under certain circumstances, a surrender to the use of a will of copyholds, and our courts of equity will here, as in England, exercise their whole machinery in aid of discovery,⁴ so that the equitable jurisdiction is indirectly larger than that of law in testamentary matters. But, unless there is some collateral equity or presumption in question, the construction of a will is essentially the same in all courts.⁵

With the exception of certain presumptions against double gifts,⁶ a court of equity has no greater latitude than a court of law in the construction of wills, or the expunging or transposing of the words thereof. This rule has not been impugned since it was laid down by Lord Hardwicke in *Duke of Marlborough v. Godolphin*.⁷ Both classes of courts, however, will transpose and even expunge words and clauses, in order to effectuate the testator's intention, as declared in other parts of the will.⁸ But the document will not be thus modified

¹ *Post v. Post*, 47 Barb. 72.

² *Downing v. Bain*, 24 Ga. 372.

³ *Myers v. Eddy*, 47 Barb. 263.

⁴ See *Story Eq. Jur.* 1489, 1490.

⁵ See *supra*, Part I, 46.

⁶ See *infra*, ch. 24, § 7 ; *supra*, Part I, notes to Proposition Seven.

⁷ 2 Ves. Sen. 74 : *Luxford's Case*, 3 Lev. 125.

⁸ *Duke of Marlborough v. Godolphin*, 2 Ves. Sen. 74.

where the existing collocation of the words is clear in meaning. A like rule applies to reading the word "and" as if it were "or," and conversely. These variations of the letter of the will can only be made when the context imperatively requires such modifications, and when without them the whole meaning of the clauses in question would be hopelessly entangled.¹ But when these conditions concur, the necessary changes will be made, and the document will be interpreted equitably at law as well as in courts of equity.

Lands were not devisable at common law, but were in equity by way of use or trust. Wills of chattels, too, were expounded only by the ecclesiastical courts, which, like the Court of Chancery, were presided over by a clergyman. All wills have thus come to be construed equitably by every court, while bequests of personalty are still more liberally interpreted than devises of land. In *Forth v. Chapman*,² the same clause received a different interpretation, as regarded land from the meaning put upon the words when applied to personalty. In *Beaumont v. Fell*,³ too, an indistinct enunciation by a dying testator was considered sufficient for a bequest, though, if it were a devise, the court intimated that its opinion might be different.

§ 8. *Repugnancy.*

In order to effectuate the main intention of the testator, words in a will may not only be transposed or modified in their meaning,⁴ but may even be wholly

¹ *Mortimer v. Hartley*, 3 De G. & S. 816; 3 Eng. Law. & Eq. 532. See *Gray v. Pearson*, 6 H. Lds. Cas. N. S. 61.

² 1 P. Wms. 663.

³ 2 P. Wms. 140.

⁴ *Finlay v. King*, 3 Pet. (U.S.) 346.

rejected. The court, indeed, is expected, like a printer, to read any manuscript, or, like a reporter, to give sense to any statement, however incongruous or involved. For these so extensive functions great latitude is accorded to the judicial interpretation. For this purpose, words of purchase will operate by way of limitation, if they can have no effect in their primary sense. The word "children," too, is deemed to be a term of limitation, if those referred to are not *in esse* at the time of making the will. This is termed the rule in Wild's Case.¹

The general or primary intention of the testator is thus always sought to be effectuated, even at the sacrifice, if necessary, of his particular intention. In other words, as false demonstration will not necessarily vitiate a description of the subject or object of a devise, so an incongruous direction as to the mode of devolution will be purged of its surplusage or heterogeneous elements, and will be moulded into a shape recognised by the law. A common instance of this rule is the construction *cy pres* of an estate tail in one to whose unborn descendants successive life estates are given, some of which are void for remoteness. Jarman,² indeed, very justly observes that many of the cases supposed to be decided on the basis of the *cy pres* doctrine were merely instances where the rule in Shelley's case was applied, inasmuch as both the general and particular intentions of the testator could be observed by giving the children estates by purchase, and the ancestor an estate *in remainder* afterwards, as in Doe v. Gallini.³ The doctrine, however, is not as Jarman⁴ alleges, "one of the absurdest ever advanced,"

¹ 6 Rep. 17; see Allen v. Hoyt, 5 Met. 324; see *infra*, ch. 23, § 4.

² Vol. II, 401, *et seq.*

³ 5 Barn. & Ad. 621; s. c. 3 Ad. & El. 340.

⁴ Vol. II, 404.

when applied as a breakwater against the rule of perpetuity: neither does it seem to be always coincident with the rule that technical expressions must get their full force unless the context is plain to the contrary. The provision of 1 Rev. Stat. of New York, 748, § 1, it may be added, was not intended to extend the doctrine of *cy pres* construction.¹

§ 9. *Transposition of words.*

Words to be transposed must be not merely inoperative where they stand, but must also be inconsistent with the context. Words, however, will be more readily transposed than expunged, and will be always readily shifted, if this will be in aid of the general intention of the testator, and the words are inoperative while left intact.² Jarman thinks³ that, if a clause conveys any meaning clearly, it ought not to be transposed, even though the clear meaning be an absurd one. But, if it is plainly absurd, this shows that its real signification, as intended by the testator, cannot be clear. It should surely be transposed, if this will effectuate the obvious intention of the testator. At the same time, transpositions of clauses, it must be admitted, are violent phases of judicial construction.

If, however, estate A be given to B. and estate C be given to D., while the limitations and description of the lands show that the wrong parcels were given to B. and D., a transposition will be readily made.⁴ As to the transposition of words see further *Mason v. Jones*.⁵

¹ *Lorillard v. Coster*, 5 Paige, 172, 227.

² See *Covenhoven v. Shuler*, 2 Paige, 122.

³ Vol. I, 440.

⁴ *Mosley v. Massy*, 8 East, 149.

⁵ 2 Barb. 229; *Pond v. Bergh*, -10 Paige, 140.

§ 10. *Alteration of words.*

Even an alteration of words is sometimes made¹ by the Court. "All" may be read "any;" "without issue" may be read "leaving issue;" "her" may be read "their;"² "severally" may be substituted for "respectively;" "or" for "and,"³ and conversely. Thus "to A. or his heirs" has often been construed to mean "to A. and his heirs."

So, under a gift to A, and "if he die under twenty-one or without issue," or "unmarried or without issue," then, over, the word "or" will be read "and," in accordance with the manifest intention of the testator, that the devise or bequest over should only take effect in case neither contingency should happen.⁴

The principle of these cases is that the reference in the alternative is to persons who would take an interest derivatively through the donee, if he retained the estate by surviving the first contingency.⁵

In New York, the word "and" has been read "or," in *Van Vechter v. Pearson*,⁶ and numerous other cases. Similar rules of construction prevail in all the other States.

In *Richardson v. Spraag*,⁷ the bequest was to such of the daughters or daughters' children of the testatrix as should be living at her death. "Or" was read "and," so that the children of living as well as of deceased daughters participated in the gift. Jarman⁸ appears to approve of this construction. Yet, it would

¹ *Brailsford v. Heyward*, 2 Des. 18.

² *Keith v. Perry*, 1 Des. 353.

⁴ *Ib.*

⁶ *Van Vechten v. Pearson*, 5 Paige, 512; *Roosevelt v. Thurman*, 1 Johns. Ch. 220.

⁷ 1 P. W. 434.

³ *Ray v. Enslin*, 2 Mass. 554.

⁵ 1 Jarm. 448.

⁸ Vol. I, 451.

seem that the word "or" was purposely used to prevent a lapse to the families of the daughters who might die in the lifetime of the testatrix.¹ Thus, in *Girdlestone v. Doe*,² where a testator bequeathed £40 per annum to A. for life, and, after her decease, to B. or his heirs, it was held that B. did not take the absolute interest, but that there was a substitutional gift to his heirs in case he died in the lifetime of A. That B.'s estate was a remainder does not seem to affect this question.

In reading "or" as "and," and in all similar cases of altering the expression, the main object of such interpretation is not to reduce any express or implied direction to total silence.

§ 11. *Rejecting words.*

If a later clause in a will merely qualifies a preceding one, both can stand.³ But, if the two passages cannot be reconciled, the latter must prevail, if it is equally relative to the testator's primary intention. As to what amount of mutual repugnancy will lead to the expunging of the prior clause, see *Morrall v. Sutton*.⁴

Where one clause in a will gives certain property to one person, and a later clause gives the same thing to another, the latter alone, in the old cases, was held to take the gift, unless this was inconsistent with the testator's primary intention,⁵ or the latter limitation had been introduced to prevent a lapse by the death of the prior donee in the lifetime of the testator. Modern decisions greatly incline to regard both donees as joint beneficiaries. But, if there is an absolute repug-

¹ *Vide* 1 Cox, 241.

² 2 Sim. 225.

³ *Sweet v. Chase*, 2 N. Y. 73; *Stickle's App.* 29 Penn. St. 234.

⁴ 1 Phillips Ch. 533; s. c. 4 Beav. 478.

⁵ See *Hollins v. Coonan*, 9 Gill, 62; *Pratt v. Rice*, 7 Cushing, 209.

nancy between two clauses, and the relative importance of neither can be determined by the general scope of the will, and the presumption of a provision for lapse cannot be entertained, the former clause will be expunged. If that clause, however, is more consistent with the general scope of the will, then the latter will be rejected.¹

Sometimes the Court will expunge words rather than cut down a limitation. As, for instance, in *Doe d. Elton v. Stenlake*,² where the devise was to A. and her heirs for their lives, the phrase "for their lives" was rejected as repugnant and void. This decision, however, will not be followed except in very similar circumstances. Probably at the present day, even in England, the word heirs would be held, in a similar passage, to mean children rather than that the limitation for life should be expunged. In the United States, the word "heirs" would be still more readily regarded as a term of purchase.³

Of two inconsistent intentions the Court will try to select the one which the testator had probably more at heart.⁴ Expunging a passage, however, is only used as a *dernier resort*, for, if possible, effect will be given to every clause.⁵

§ 12. *Supplying words.*

It seems to be an error to suppose that words are ever "supplied," as distinguished from being implied, in a will. All that the Court does in this respect is not to amend an omission or rectify a mistake, but simply

¹ See *Bartlett v. King*, 12 Mass. 537.

² 12 East, 515.

³ See *infra*, ch. 6, "Rule in Shelley's Case."

⁴ *Malcolm v. Malcolm*, 3 Cush. 472; *Bradstreet v. Clarke*, 12 Wend. 602. See *Bradley v. Amidon*, 10 Paige, 235.

⁵ *Parks v. Parks*, 9 Paige, 107.

to construe provisions so liberally as that the same clause in a deed not executory might not be operative without the addition of more words. Implications in a will are, indeed, often rendered necessary by mistakes of omission. Still, the two things are plainly different: an implication construes the will as it is; a rectification amends and alters it.¹

Where a testator left annuities to two daughters in similar terms, but the annuity to one was liable in a certain contingency provided for in respect of the other, the Court construed the will so as to supply the omission.² But, as a rule, the maxim that the including of one is the excluding of another will apply. Thus, in *Nichols v. Romaine*,³ a declaration that a certain charge should not affect one residuary devisee made the charge affect the rest of the residuary devisees. As to rejecting words, see further, *Pond v. Bergh*.⁴

Under a devise to A., and the issue male of his body, and, if he die without issue of his body, over, the word male was supplied before the second word "issue."⁵ Words, however, will be supplied as sparingly as possible, and by no means with a view of effectuating the whole presumed intention of the testator.⁶ Yet the words "die," "leaving," &c., and the pronouns, are often supplied, or rather inferred from the context.⁷

Where a will is numbered into sections, words of limitation at the end of a section will be more readily

¹ *Hay v. Earl of Coventry*, 3 T. R. 83.

² *Stewart v. Chambers*, 2 Sandf. Ch. 382; see *Drake v. Pell*, 3 Edw. Ch. 251; *Pond v. Bergh*, 10 Paige, 140; *Carter v. Bloodgood*, 3 Sandf. Ch. 293.

³ 9 How. Pr. 512.

⁴ 10 Paige, 140; *Grim v. Dyar*, 3 Duer, 354.

⁵ *Tuck v. Frencham*, Moore, 13 pl. 50.

⁶ *Hamilton v. Boyles*, 1 Brev. 414.

⁷ *Brown v. Brown*, 1 Dana, 41; *Lynch v. Hill*, 6 Munf. 114.

applied to all the gifts in the section than if the will were not so numbered into parts.¹

§ 13. *Misdescription.—False demonstration.*

An addition of certain erroneous particulars—false demonstration, as it is termed—to a description otherwise perfect, produces no ambiguity if the gift is applicable only to one person and thing.² For, such words being inapplicable to any subject, their rejection does not affect the construction. Therefore, a bequest of stock in the A. Bank has been held to pass stock in the B. Bank; as the testator had no stock in the former bank.³ So, if real property is described as personalty, it may, nevertheless, pass. Thus, in *Woods v. Moore*,⁴ it was held that a devise of land would pass a mortgage on it if the testator had no other interest in land. So a bond described as given to O. for L.'s use has been held a sufficient description of a bond executed by S. and delivered to O. as agent for the use of L.⁵ A false demonstration is innocuous, and will be expunged only when the remainder of the description is sufficiently accurate. Otherwise the whole clause is, of course, null and void.⁶ It is laid down in *Smith v. Smith*⁷ that no extent of misdescription will neutralize the gifts, if the will, besides the false demonstration, contains sufficient marks of identification. This position seems irrefragable. As to false demonstration, see further, *Lush v. Druse*.⁸

¹ *Stevens v. Snelling*, 5 East, 87.

² *Woods v. Moore*, 4 Sandf. 579.

³ *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. 144.

⁴ 4 Sandf. 579.

⁵ *Smith v. Wyckoff*, 3 Sandf. Ch. 77; 3 Bradf. 393.

⁶ *Jackson v. Sill*, 11 Johns. 201.

⁷ 4 Paige, 271.

⁸ 4 Wend. 313; *Worthington v. Hylyer*, 4 Mass. 196; *Blague v. Gold*, Cro. Car. 447; *Davis v. Rainsford*, 17 Mass. 210.

§ 14. *Uncertainty of subject of gift.*

If the subject or object be once sufficiently identified in any legal way, either by construction, or parol, false additions will be inoperative.¹ A misnomer of a county, parish, or street, or a misdescription of a tenant is also unimportant.² A misdescription of the interest, as calling a leasehold freehold,³ or the converse⁴ error is unimportant where the testator has no other but the misdescribed property.

A devise of land by name, and described as situate in A. county, will pass the whole of the land, even though it is not wholly situate in A. county.⁵ A devise of "all my homestead farm in D., being the same farm whereon I now live, and the same which was devised to me by my father," will pass the whole of the homestead farm, though it appears that a part of it was not devised by the father.⁶

In *Bowman v. Milbanke*,⁷ the limitation "I give all to my mother," was held to be void, the word "all" being indefinite. In *Mohun v. Mohun*⁸ a like decision was arrived at. These cases would hardly, however, be followed now. Even in an early case, *Taylor v. Webb*,⁹

¹ *Drew v. Drew*, 8 Foster (N. H.), 489; *Blague v. Gold*, Cro. Car. 447, 473.

² See *Dodson v. Green*, 4 Dev. 488; *Hastead v. Searle*, 1 Ld. Raym. 728; Brownl. 131; *supra*, Part I, p. 122 *et seq.*

³ *Denn d. Wilkins v. Kemeys*, 9 East, 366.

⁴ *Day v. Trig*, 1 P. W. 286.

⁵ *Hammond v. Ridgley*, 5 Harr. & J. 245; *Dorsley v. Hammond*, 1 Id. 190.

⁶ *Drew v. Drew*, 8 Foster (N. H.), 489. See *Woods v. Woods*, 2 Jones Eq. N. C. 420; *Colpoys v. Colpoys*, Jacob, 464; *Fisher's Digest*, Title Will, § 3; *Doe d. Jersey v. Smith*, 2 B. & B. 553; *Goode v. Goode*, 22 Mo. 518.

⁷ 1 Lev. 130.

⁸ 1 Swans, 201.

⁹ *Styles*, 301, 307, 319.

the words, "I make my cousin, A. B., my sole heir and my executor," passed the testator's property to A. B.¹

But a bequest of "some of the best of my linen"² would even at the present day be void for uncertainty. So, also, would a request that a handsome gratuity be given to a certain person.³

Yet a definite devise out of a larger interest is good, as, for instance, a devise of two out of four acres; and the devisee shall elect.⁴ A devise of close A., the testator having two closes of that name, was held void in *Richardson v. Watson*.⁵ But, parol evidence is received to identify the close meant. If, however, no such evidence can be forthcoming, the devise is void, even at the present day, when gifts are rarely, or never void for uncertainty.

The phrase "what shall be left" will not be deemed void if relating to furniture or other articles that are subject to wear and tear, nor *semble* where the property, no matter of what kind it is, has been previously limited to another for life.⁶ So, if "what is left" means what is unappointed under a power given to the tenant for life.⁷ The older cases are all opposed to such readings, which, however, would probably be followed in any very doubtful case, even though not falling strictly within the principle of any of the later decisions.

¹ See *Rothmaler v. Myers*, 4 Des. 215; *Trippe v. Frazier*, 4 Har. & J. 446.

² *Peck v. Halsey*, 2 P. W. 387.

³ *Jubber v. Jubber*, 9 Sim. 503; see *Jones d. Henry v. Hancock*, 4 Dow. 145.

⁴ *Grace Marshall's Case*, Dy. 281 a. n. See *Hobson v. Blackburn*, 1 My. & K. 574.

⁵ 4 B. & Ad. 798.

⁶ *Cooper v. Williams*, Pre. Ch. 71, pl. 64; *Gibbs v. Tait*, 8 Sim. 133.

⁷ *Surman v. Surman*, 5 Madd. 123.

§ 15. *Uncertainty of object of gift.*

A devise to one of the sons of J. S. is void for uncertainty.¹ Yet a power to appoint to any of the sons of J. S. will be, in default of appointment, executed in favor of all equally by the Court. A devise to twenty of the poorest of one's kindred is void for uncertainty.²

A devise to a voluntary society passes an interest to the then members.³ Indeed, it would not be safe at the present day to rely upon any of the old cases with respect to the question what invalidates a gift for uncertainty.⁴

A devise, however, to one's heir-at-law or next of kin would probably now be not held void.⁵ And a devise to such persons as shall be testator's partners at the hour of his death has been held valid.⁶ Under a bequest to Robert, fourth son of B., the third son, whose name was Robert Henry, was held to take, the name of the fourth son being John William.⁷ In *Wood v. White*⁸ a testator bequeathed a legacy to J. Wood. Parol evidence was accepted to show that George Wood was the person intended. Here the will was insensible with reference to surrounding facts. But, if there was a J. Wood known to the testator, parol evidence should be excluded.

¹ See *Strode v. Lady Falkland*, 3 Ch. Rep. 183; *McDermott v. United Ins. Co.* 3 Serg. & R. 607.

² *Webb's Case*, 1 Roll. Ab. 609 (D.) 1.

³ *Bartlett v. King*, 12 Mass. 537.

⁴ See 1 Jarm. 322, 324.

⁵ *Lowndes v. Stone*, 4 Ves. 649. See 7 Sim. 363.

⁶ *Stubbs v. Sargon*, 2 Keen, 255. See *Prestwidge v. Groombridge*, 6 Sim. 171; *Powell v. Davies*, 1 Beav. 532.

⁷ *Gillett v. Gove*, 18 W. R. 423.

⁸ 32 Me. 340, in Eq. See *supra*, Part I, notes to Propositions 3 and 5.

Under a bequest to John and Benedict,¹ sons of A.B., a son named James (as there was no John) was held entitled.² The words, "members of my family" have been considered sufficiently definite.³ A bequest to a society named as of London was held, *in re* The Clergy Society,⁴ not to apply to a society of the name in the bequest, but which was out of London, and although there was no society at all of the name in the metropolis. Judge Redfield⁵ thinks it was a case of false demonstration, and this appears to be its true nature. The decision, however, cannot be deemed of much authority. The case of *Stringer v. Gardiner*⁶ also appears to be one fit for the reception of parol evidence. A name by repute is a sufficient description of a person.⁷ Devises to corporations have been construed rather strictly in those cases where corporations may legally take land by will.⁸ Yet it is likely that at the present day they would receive the same benignity of interpretation as if they were private individuals.

A testator gave to the School Commissioners and their successors of "South Farnham district, Essex county, for the schooling of the poor children of that district, \$1,000, to be put out at interest, and the

¹ *Smith v. Coney*, 6 Ves. 42; *Holmes v. Custance*, 12 Ves. 279; *Garth v. Meyrick*, 1 Bro. C. C. 30.

² See *Dowsett v. Sweet*, Amb. 175; 1 Jarm. 330; *Smith v. Smith*, 4 Paige, 271; s. c., 1 Edw. 189; *Trustees v. Peaslee*, 15 N. H. 317; *Woods v. Moore*, 4 Sand. Sup. Ct. 537; *Winkley v. Kaime*, 32 N. H. 268; *Douglas v. Blackford*, 7 Md. 8. *In re Bicket's trust*, 2 Eng. Law & Eq. 66.

³ *Hill v. Bowman*, 7 Leigh, 650.

⁴ 2 K. & J. 615.

⁵ Vol. I, 585.

⁶ 5 Jur. N. S. 260. See 1 Redf. 585.

⁷ *Sutton v. Cole*, 3 Pick. 232; *Newthway v. Ham*, Tamlyn, 316; *Parsons v. Parsons*, 1 Ves. Jun. 266, Sumner's notes. See *Standen v. Standen*, 2 Ves. Jun. 589.

⁸ *Attorney-General v. Sibthorp*, 2 Russ. & My. 107.

interest only to be applied for the schooling of said poor children." There were School Commissioners of the county Essex, of whom the testator was one at the time of his death, but they were not incorporated. There were no more school commissioners of South Farnham district, nor was there any such district, though there was an ancient parish of the name. The bequest was held void.¹ The case of *Janey v. Latone* is hardly reconcilable with *Minot v. Boston Asylum*.² In this case the legacy was to the "Boys' Asylum and Farm School." There being no institution or association of any similar name, except a body incorporated by the name of "The Boston Asylum and Farm School for Indigent Boys," this institution got the legacy.³

Owing to the admissibility of parol evidence to identify a beneficiary in cases of ambiguous description, a gift so limited very rarely fails.⁴

The law of wills is, in the respects we are now considering, based exactly on the same principles as the law of deeds, except, of course, that in point of fact gross misdescriptions rarely or never occur in instruments made *inter vivos*. The tendency of the courts both in England and the United States is to deal more and more benignantly every day with loosely drawn

¹ *Janey v. Latane*, 4 Leigh, 327. See *Telfair v. Horne*, 3 Rich. Eq. 235; *Carter v. Balfour*, 19 Ala. 814.

² 7 Met. 416.

³ See *General Lying-in Hospital v. Knight*, 11 Eng. Law & Eq. 191; *McBride v. Elmer*, 2 Halst. Ch. 107; *Baldwin v. Baldwin*, 2 Halst. Ch. 211; *Calhoun v. Furgeson*, 3 Rich. Eq. 160; *Trustees v. Peaslee*, 15 N. H. 317; *Button v. Amer. Trust Soc.* 23 Vt. 336; *St. Louis Hospital Association v. Williams*, 19 Mis. (4 Bennett) 609.

⁴ *Smith v. Smith*, 4 Paige. See *Doe d. v. Huthwaite*, 3 Moore, 304; s. c. B. & Ald. 632.

wills, and to strive to effectuate the intention of testators, if this be at all practicable.¹

The early cases on the law of wills are, in the main, unreliable at the present day. Where, as in Lord Cheney's case, they have furnished a text that has been acted upon in subsequent decisions, the old authority has even improved by time. But an old will case, standing alone, is at present almost valueless. This is peculiar to the law of wills. As regards conveyancing *inter vivos*, the old common law rules apply to every new phase of events, except so far as statute law has otherwise provided. Wills, on the contrary, being construed according to the intention of the testator, have not been interpreted according to any strict general rules; or rather, indeed, the principles of testamentary interpretation have been altered, and the courts will now accept parol evidence in many cases where it would have been formerly held to be inadmissible. The old decisions, too, on other points, such as the meaning of the word "family," "relations," &c., would not be followed at the present day. Scarcely any testamentary gift will be held void at present. Besides, then, the inherent mutual diversities of cases, the law of the construction of wills has gradually varied, both with respect to intrinsic and extrinsic evidence. Old testamentary cases, therefore, must stand on their merits. By themselves they are not now of much or, indeed, of any authority, even in England. They have still less weight in America.

Thus in *Doe d. Hayter v. Joinville*,² a devise to the testator's "brother and sister's family" was held void for uncertainty, inasmuch as there were children of two

¹ See Broom's Legal Maxims, title, *Falsa Demonstratio non nocet cum de corpore constat*; *Brewster v. McCall*, 15 Conn. 274.

² 3 East, 172.

sisters of the testator, one living and one dead, and it did not appear which of them was intended. All such difficulties are now aided partly by parol evidence and partly as in *Doe d. Hayter*, by settled rules of construction as to the meaning of the general expressions used. A gift to the son of A. B.¹ is even now-a-days stated in text-books of authority to be void for uncertainty. But it is probable that the American courts would admit of parol evidence rather than construe the gift as void for uncertainty. Jarman himself observes² that a devise to a person sustaining a given character, as to "my brother's son," &c., without furthermore, raises a fit case for the adduction of parol evidence, if there be more than one person to whom the devise is applicable. There is no doubt of the soundness of this view in principle, though, unhappily, there is no case exactly in point.

Several questions, therefore, arise in respect to every such vague designation. First, whether the specification of the donee is not void for uncertainty;³ secondly, as an invalidity upon the ground of uncertainty is very rare, whether the precise person may not be inferred from evidence of the testator's circumstances, habits, and mode of life, but not from his expressions or declarations regarding the intended objects of his bounty;⁴ thirdly, whether direct evidence of such declarations, that is to say, of the testator's intention, may not be produced;⁵ fourthly, whether the specification of the donee is not complete in the will, and so precludes the application of parol evidence as in *Doe d. Westlake v. Westlake*.⁶

¹ *Dowsett v. Sweet*, Amb. 175.

² Vol. II, 375.

³ *Hand v. Hoffman*, 3 Halst. 71; *Kelly v. Kelly*, 25 Penn. St. 460.

⁴ *Wootton v. Redds*, Exr. 12 Grat. 196; *Doe d. Hiscocks v. Hiscocks*, *supra*, Part I, pl. 183.

⁵ *Gass v. Ross*, 3 Sneed, 211.

⁶ 4 B. & Ald. 57.

In *Doe d. Westlake v. Westlake*, the devise was unto "Matthew Westlake, my brother, and to Simon Westlake, my brother's son." The testator had three brothers, Thomas, Richard, and Matthew, each of whom had a son named Simon; Thomas and Richard were mentioned in previous parts of the will. The court held that there was no latent ambiguity or any difficulty in applying the bequest so as to involve a reconsideration of the construction of the will, and that it was clear on the face of the will that the nephew intended was the son of Matthew, he being mentioned immediately after the devise to Matthew. The clauses of the will marked off the different devises to the various members of the testator's family. This grouping of the devisees evidently prevented any ambiguity or doubt arising as to which nephew was intended by the devise to the "brother's son."

Parol evidence is of course admitted to induce an operation of the rule in *Wild's case*¹ rather than of the rule in *Shelley's case*. But, if either of the contending nominees die in the lifetime of the testator, this event, of course, will not affect the construction of the gift.² For neither intrinsic evidence, that is to say construction, nor extrinsic evidence, which is also a kind of construction, is ever allowed to be controlled by accident, and not law. Latterly too, parol evidence is not in certain cases admitted as freely as it was in early times.³

Parol evidence is more freely admitted in America than in England, both under Propositions Three and Seven (*ante* Part I).⁴ Yet, parol evidence of intent will not, as a rule, be received if the description suits

¹ 6 Co. Rep. 17.

² *Jones v. Newman*, Sir W. Black. 60.

³ 1 Greenl. on Ev. 327.

⁴ Pp. 50, 51.

one person or thing more than another.¹ But in cases where the description is inaccurate as to all the claimants, and any parol evidence is admitted in aid of the construction (the meaning of the passage not being capable of being settled by construction), it is generally hard to determine whether the disposition so aided by evidence of the testator's circumstances really suits one claimant or property more than another. The American rule, therefore, on this particular point is more likely to become the ultimate standard than the rule in *Hiscocks v. Hiscocks*,² which in such cases admits of parol evidence of the testator's circumstances, but not of his intention.

There is some reason to contend that where, as under the Revised Statutes of New York, a will of land speaks from the death of the testator, parol evidence ought to be no longer admissible to show that a devise was insensible at the time of the making of the will, if the words of the disposition are taken in their primary sense. If the gift is sensible, or might be sensible, at the time of the testator's death, the usual ground for the adduction of parol evidence in aid of the construction is taken away. In other words, land, in respect of this point, appears to be placed on the same footing as personalty, and is no longer specific as regards the testamentary or disposing power, though it has been properly held to be specific in England, under 1 Vict., c. 26, in contests between the residuary devisee and specific legatees of chattels, with respect to their relative liability to the testator's creditors. It is doubtful, however, whether as regards the point now under con-

¹ See *Horwood v. Griffith*, 4 De G. M. & G. 708; *Wilson v. Squire*, 1 Y. & C. C. C. 654.

² *Supra*, Part I, pl. 183.

sideration, the courts will hold that land is, to all intents, assimilated to personalty.

A bequest of personalty does not operate as an execution of a general power, because, though the testator have not personalty at the time of making the will, yet he may acquire such property before his decease.¹ Why should not this rule, it may be asked, be now extended to devises of land, since the testator may contemplate the purchase of land, though he has none at the time of making the will. The present rules regulating appointments of realty, however, will probably keep their ground, not so much perhaps by reason of their intrinsic merits, as on account of the imperfections of the technical rules to which a contrary view would assimilate them.

§ 15. *General observations.*

In *Pray v. Belt*,² a power was given to the executors, *finally*, to decide what was the testator's intention, in case of dispute. The courts, however, would not hold their jurisdiction ousted by such a direction, if the executors abused the trust.³ To deny access to the public tribunals is to shut a highway open of common right to all citizens. A direction of the nature referred to, therefore, infringes upon a rule of public policy which it is not within the sphere of private donation to restrict or alter.

The construction of a will cannot be affected by the occurrence of contingencies against which the testator might have provided differently if they occurred to his mind. The court can place itself only in the position of the testator, but cannot interpret the will by the

¹ *Jones v. Tucker*, 2 Mer. 533.

² 1 Pet. 670.

³ *Ib.*

light afforded by any subsequent occurrence not amounting to a revocation or ademption of a gift in the will. See further, as to principles of testamentary construction, *Terpenning v. Skinner*.¹

Where the description is merely defective, parol evidence is freely admitted in America as to the testator's circumstances. See *Howard v. Am. Peace Society*.²

On the other hand, there is an equally strong tendency in both England and the United States, to settle questions of misdescription or false demonstration by construction, if possible, rather than by parol evidence, though at the same time there is a growing desire on the part of the courts of both countries to give every disposition some effect, if this can be done by construction.

¹ 30 Barb. 373; *Post v. Hover*, 33 N. Y. 593; *Bates v. Hillman*, 43 Barb. 645; *Carter v. Hunt*, 40 Barb. 89; compare *Lovett v. Kingsland*, 44 Id. 560; *De Nottebeck v. Astor*, 3 Kern. 98; *Mann v. Mann*, 14 Johns. 1; *Howland v. Union Theolog. Sem.* 3 Sandf. 82; *Chrystie v. Phyfe*, 19 N. Y. (5 Smith) 344.

² 49 Me. 288. See also *Winkley v. Kaime*, 32 N. H. 268; *Haydon v. Ewing*, 1 B. Mon. 113; *Doe v. Roe*, 1 Wend. 541; *Domestic and Foreign Missionary Society's Appeal*, 30 Penn. St. 425; *Britton v. American Tract Society*, 23 Vt. 336.

CHAPTER III.

FRAUD, ACCIDENT, OR MISTAKE.

§ 1. *Fraud.*

Questions of fraud are triable by means of the issue of fact *devisavit vel non*, and are not, therefore, properly comprised in a treatise on the construction of wills. What is fraud or undue influence (which is a species of legal fraud), is a question of fact, as to which no general rules can be laid down.¹ It seems desirable, however, that, except in cases where the testator's sanity is in question, the court should be astute in not regarding every high degree of influence over a testator as undue; and this, indeed, is considered to be the American rule.

It is said in *Marsh v. Tyrrell*,² that undue influence by a husband is more easily proved than if the influencing party were a stranger. But, this proposition is opposed to all the dictates of natural law and affection. The influence of a husband, wife, or child should rarely or never be considered undue, except in cases where the testator was tainted with mental infirmity.³

A testator's knowledge of the contents of his testament will be presumed, if he were of sound capacity.

¹ See *Dietrick v. Dietrick*, 5 Serg. & R. 207; *Nussea v. Arnold*, 13 Serg. & R. 323; *McMahon v. Ryan*, 20 Penn. St. 329; *Chandler v. Ferris*, 1 Harring, 454; *Mountain v. Bennett*, 1 Cox, 355; *Hacker v. Newborn*, Styles. 427.

² 2 Hagg. 84-141.

³ See *Small v. Small*, 4 Greenl. 220; *Lide v. Lide*, 2 Brev. 403; *Elliott's Will*, 2 J. J. Marshall, 340; 1 Redf. 521, *et seq.*

But, if he were mentally weak, proportionately strong proof must be given that he was aware of the contents of the document. Proof of capacity, and of the act of execution, therefore, raise a presumption of the testator's knowledge of the contents of the instrument. The mere fact that the will was not prepared at the testator's request does not invalidate it; nor is the omission to read it over to him very material, if there is reason to believe he knew its contents.¹

As to undue influence, see further *Matter of Walsh*.²

When a provision in a will is held invalid on account of fraud or undue influence, the rest of the will may, nevertheless, be valid.³ So, if a passage in a will has been inserted contrary to, or without the directions of, the testator, it is void, but does not affect the remaining portions of the will.⁴

Independent parts of a will are unaffected by any fraudulent or void clauses,⁵ except in the respects described in chapter xxvi *infra*, on "Void Testamentary Gifts."

If a devise is made to several persons by reason of a promise by one devisee, which vitiates the gift to him, it is void as to all. See *Tee v. Ferris*.⁶ It is an incident of all deeds and contracts, that if any part of

¹ *Gerrish v. Nason*, 22 Me. 438; *Vernon v. Kirk*, 30 Penn. 218; *Clifton v. Murray*, 7 Ga. 564.

² 7 N. Y. Leg. Obs. 153 S. P. 1854; *Leacraft v. Simmons*, 3 Bradf. 35; *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Bleeker v. Lynch*, 1 Bradf. 458; *O'Neil v. Murray*, 4 Bradf. 311.

³ *Lord Trimblestown v. D'Alton*, 1 Dow & Cl. 85; s. c. 1 Bligh, N. S.; *H. L. Cas.* 427; see *Florey v. Florey*, 24 Ala. 241.

⁴ *Comstock v. Hadlyme*, 8 Conn. 254; *Abercrombie v. Abercrombie*, 27 Ala. 489; *Harrison v. Morton*, 2 Swan, 461.

⁵ *Florey v. Florey*, 24 Ala. 241.

⁶ 2 K. & J. 357.

the consideration is contrary to public policy, the whole indivisible contract is void, because the consideration is the foundation of the whole matter, and the degree of influence which the bad consideration exercises on the granting party cannot be estimated and discerned from the other motives. But, if the consideration is good, though some of the covenants contracted for are void and illegal, yet the good stipulations will be enforced, if they are clearly separable from the unsound ones. An action can be maintained for their breach at law, or they can be specifically enforced in equity. For chancery always enforces what is good and definite, if clearly separable from what is void or indefinite.

A legacy given by a woman to a person whom she regards as her husband, but who is secretly married to another, is void as fraudulent.¹ But a legacy given to a person whom the testator erroneously supposes to be his child is good. So is a legacy to an unchaste wife, and a legacy to the child of a bigamist is not avoided by reason of the bigamist obtaining, as the reputed wife of testator, a gift to herself. Nor will a false affirmation of celibacy or marriage avoid a gift, unless the testator is injuriously affected by such affirmation.²

§ 2. *Accident or mistake.*

A mistake patent on the face of the will is rectified by chancery.³ When the mistake is patent, equity does not, strictly considered, travel outside of the written

¹ Digest, lib. 35; tit. 1 L. 72, § 6; *Wilkinson v. Joughin*, 12 Jur. N. S. 330.

² *Rishton v. Cobb*, 9 Simons, 615.

³ *Mellish v. Mellish*, 4 Ves. 45; *Phillips v. Chamberlaine*, 4 Ves. 51; *Milner v. Milner*, 1 Ves. Sen. 106; *Door v. Geary*, 1 Ves. Sen. 255.

will, or act on parol evidence at all. The case is rather one of *cy pres* construction or *falsa demonstratio*.¹ Equity does not relieve in such cases on the ground of mistake in the general equitable sense of that term,² or admit parol evidence,³ but merely reconciles seemingly incongruous passages.

A mistake not patent on the will is irremediable. Therefore, parol evidence is not admissible to show that the testator made his will under the erroneous impression that one of his children was dead,⁴ or that the will was in any respect owing to his mistake of facts.⁵ But, mistakes in the description of gifts or of donees may be rectified by extrinsic evidence.

In the case of the Earl *v.* the Countess of Newburgh, the mistake appears not to have been completely or clearly proved. But in *Langston v. Langston*,⁶ a line was omitted by the person who copied the will for signature. Yet, Lord Brougham, though he inspected the draft for other purposes, admitted that the evidence was not to be received. His Lordship, indeed, should not have looked at proofs forbidden by the law of evidence.

It is, however, settled that mistakes of the nature of omissions, as distinguished from misdescriptions, cannot be rectified by parol. This was decided in respect of real estate in *Andress v. Weller*.⁷ Neither can an omission be supplied in respect to personalty by parol and the written instructions given to the scrivener. See

¹ *Danvers v. Manning*, 2 Br. C. C. 18; see *Giles v. Giles*, 1 Keen, 692; *Eatherly v. Eatherly*, 1 Caldwell, 461.

² *Lady Newburgh's Case*, 5 Madd. 364.

³ *Mann v. Mann*, 1 Johns. Ch. 231.

⁴ *Gifford v. Dyer*, 2 R. I. 99.

⁵ 2 *William's Ex.* (2 Amer. ed. c. 2, § 4, p. 867; Part I, *supra*, p. 265).

⁶ 8 Bligh, N. S. 167.

⁷ 2 Green Ch. 604, 608.

also *Fawcett v. Jones*,¹ and *Hughes v. Turner*,² where it was held that a revoked will could not be examined for light to construe a subsequent unrevoked will.

Equity will rectify a clear mistake or omission in a will, if it is apparent on the face of the document, as in the case of the mistake of a figure.³ An omission, however, can never be apparent so as to obtain the aid of the court. For, if it can be spelled out from the rest of the will, it is not wholly unexpressed by the testator, and is not a real case of omission. Parol evidence is admissible to prove that a clause has been inserted, but not that one has been omitted by mistake.⁴

Parol evidence is admissible to show that a will or any other document is not as it purports to be, a fair *bona fide* expression of the will of the person whose property is sought to be charged by it. Therefore, when a will or any part thereof has been obtained or directly occasioned by fraud, accident, mistake, or inadvertence, it will be annulled by the court, and the intestacy of the testator will be so far established. The parol evidence is admissible to show that the will is not genuine, but not to establish a basis for rectifying the instrument. It will be simply annulled, but not reformed, although if it were a contract it might be specifically enforced, according to the intention of the parties, as proved by parol.

Parol evidence is also admissible to show that a will is void in law, or has been defeated in fact by lapse or ademption.

¹ 3 Phil. 434.

³ 4 Hagg. 52.

² *Ouseley v. Anstruther*, 10 Beav. 453. ⁴ See *supra*, Part. I, p. 277, *et seq.*

CHAPTER IV.

MEANING OF CERTAIN WORDS AND PHRASES.

§ 1. *Terms of devise. Real terms.*

The primary meaning of a term or phrase, as denoting merely personalty or realty, becomes unimportant, if, as is not unfrequently the case, the context shows that the testator used the terms in a different or peculiar sense. Accordingly, the words "devise," "bequeath," "realty," "personalty," "legacy," &c., are convertible, if the testator so uses them. However, if he uses in one part of the will the phrase "house, land, goods, and chattels," and in a subsequent part of the will uses the same phrase with the omission of the word land, the omission will not be deemed accidental, but will have the effect of not conveying the land in the second clause.¹ And yet even this decision seems unsatisfactory, such little weight is to be given to the use or omission of a single descriptive term in a will.

All the English decisions which have widened the grammatical meaning of terms so as to pass property not ordinarily comprised within their signification may be regarded as having full force in America.² But such decisions of the English courts as are technical and restrictive are to be regarded here with caution, and,

¹ *Roe v. Walker*, 3 B. & P. 375.

² See *Ferguson v. Zepp*, 4 Wash. C. C. 645; *Wheaton v. Andress*, 23 Wend. 452.

unless confirmed by a long series of American authorities, they must always be considered weak.

The term "land," by the Revised Statutes of Massachusetts, ch. 61, § 32, comprises tenements and hereditaments. Though the term ordinarily does not include incorporeal rights, yet it will pass them, if the testator has no other real estate.¹ In the same State the words "estate," "property," carry realty, unless restrained by the context.² Similar rules prevail in Connecticut,³ and the other States.

The word estate has, except in very early cases, always conveyed real property, unless the term be used as a general word after a specific description of chattels, and with reference thereto,⁴ or else is explained by the context to mean merely personal estate. Even if the will contains a devise of realty, the term estate in a residuary clause may still, of course, by force of the context, be confined in meaning to personalty.⁵ If the testator uses, in connection with the word estate, the terms "bequest," "bequeath," "legacy," and other words descriptive of personalty, this use of terms may also cut down the meaning of "estate." "Land" comprises all corporeal realty, whether in possession or not. "Tenement" includes all realty, whether corporeal or incorporeal, such as rights of way, rent-charge, &c. "Hereditament" includes land, tenements, and heir-looms.

Where no local statute is in question, the phrases

¹ 1 Jarm. 615. See *Bullard v. Goffe*, 20 Pick. 252; *Hunt v. Hunt*, 4 Gray, 193.

² *Kellogg v. Blair*, 6 Met. 322.

³ *Korn v. Cutler*, 26 Conn. 4; 2 Redf. 318.

⁴ See 2 Hill Abr. of Real Estate; *Morrison v. Temple*, 6 Binn. 97; *Jackson v. Delany*, 11 Johns. 365; *Godfrey v. Humphrey*, 18 Pick. 539; *Bullard v. Gough*, 20 Pick. 252.

⁵ *Woollam v. Kenworthy*, 9 Ves. 137; *Budsall v. Applegate*, 1 Spencer, 244.

"land," "real estate," include freeholds and copyholds, held beneficially or in trust, but not leaseholds, unless they are blended with freeholds.¹ A general devise of land, however, will pass only the legal estate in a mortgage, and not the money secured by it.²

The term "property" will pass both realty and personalty, if there is nothing in the context to the contrary,³ and the legal presumption is in favor of this extended meaning of the word.⁴ The term also embraces choses in action.⁵

The phrase "all my property of every description" will pass everything, whether real or personal, vested or in expectancy, belonging to the testator.⁶ In *Hopewell v. Ackland*⁷ the phrase "whatsoever else I have in the world," was held to convey realty in fee.

A devise of rents and profits is a devise of the land itself.⁸ So, a gift of the produce of personal property is equivalent to a legacy of the corpus.⁹

A reversion, or lease *pur autre vie*, will pass under a general devise of land, even though there is other property to satisfy the devise.¹⁰ A reversion in fee in settled lands will also pass under a devise of lands not settled. A reversion, in short, is synonymous with land.¹¹

Even though some of the limitations be inapplicable to a reversion, yet it may pass, as the limitations

¹ *Thompson v. Lady Hawley*, 2 B. & P. 303.

² *Woodhouse v. Meredith*, 1 Mer. 450.

³ *Jackson v. Hansel*, 17 Johns. 281; *Hurdle v. Outlaw*, 2 Jones Eq. (N. Car.) 75.

⁴ 1 Jarm. 664.

⁵ *Fogg v. Clark*, 1 N. H. 163; *Morrison v. Semple*, 6 Binn. 94; *Brown v. Dysinger*, 1 Rawle, 408.

⁶ *Hurdle v. Outlaw*, 2 Jones Eq. N. Car. 75.

⁷ 5 Salk. 239.

⁸ *Van Bulhard v. Nace*, 1 Grant's Cases, (Penn.) 233; 1 Johns. Ch. 499; 9 Mass. 372.

⁹ *Adamson v. Armitage*, 19 Ves. 416.

¹⁰ *Steel v. Cook*, 1 Met. 281.

¹¹ *Rooke v. Rooke*, 2 Vern. 461.

will be held to apply to other lands,¹ if the testator have such. This rule applies also to deeds. Even if the testator have no other lands but the reversion, yet, the incongruous limitations will be expunged *ut res magis valeat*.²

The phrase "all I am worth" will carry realty.³ This case exemplifies, in Jarman's opinion,⁴ the extreme point to which the decisions have gone.

As the word "devise" will not always carry realty,⁵ so, conversely, the term "bequeath" will not always be confined to mere personalty. Yet, the phrase "all I shall die possessed of at the time of my death" has been held in England not to carry realty.⁶ A different construction would probably be adopted in America.

A devise of a West Indian plantation will carry the stock and implements upon it.

The word "effects," without the prefix "real," will not carry land, and in *Camfield v. Gilbert*⁷ this conclusion was arrived at, though the word "effects" was followed by the phrase "of what nature, kind, or quality soever." This was an unnatural construction, and would probably not be followed in America. On the other hand, in *Roe d. Penwarden v. Gilbert*,⁸ the phrase "personal and testamentary estate and effects whatsoever" was held to have passed the fee. Yet, it is probable the testator, from his use of the word "personal," intended to confine the meaning of the term "testamentary" to the personalty for which the eccles-

¹ Doe d. Cholmondeley v. Weatherby, 11 East, 322.

² See Strong v. Teatt, 2 Bur. 912; overruled by Church v. Mundy, 12 Ves. 426.

³ Huxtep v. Brooman, 1 B. C. C. 437.

⁴ 1 Jar. 681.

⁵ Camfield v. Gilbert, 3 East, 510.

⁶ Monk v. Mawdsley, 1 Sim. 286.

⁷ 3 East, 510.

⁸ 3 Bro. & Bing. 85.

iastical courts gave probate. If the will contains specific devises of land, general terms, such as property, &c., will the more readily be held to pass realty.¹

Peculiar interests in land, capable by custom of being conveyed in a particular manner, such as copyholds not surrendered to the use of testator's will, can still pass in equity by a devise of land or realty, if the testator has no other real estate,² or rather, as the construction of a will at law and equity is the same, equity will, in favor of certain persons, supply the defect, if it be not one affecting the execution of the will itself. Leases or terms will also pass under a general devise of land, if the testator has no other realty.³

In *Doe d. Spearing v. Buckland*,⁴ a preamble to the will expressed an intention to convey all the testator's estate, both real and personal. Yet, a bequest of the residue of his "estate and effects of any nature" whatsoever to A., his executor or administrator, in trust, to add the interest to the principal, was held not to comprise realty.

General terms will the more readily be confined to personalty only, if the legatee is also named executor.⁵ But, the force of the word land would hardly at the present day be confined in any State to leaseholds or rents due on freeholds, even if the devisee is also named as executor, and though there be an exception from the general gift of articles of personalty only.⁶

Lands which the testator has contracted to buy will pass under a general devise,⁷ and, conversely, as regards lands which he has contracted to sell, only the legal interest will pass, according to the maxim that equity

¹ 1 Jarm. 669.

² *Rose v. Bartlett*, Cro. Car. 293.

³ See *Noel v. Hoy*, 5 Madd. 38.

⁷ *Acherley v. Vernon*, 10 Mod. 518.

² 1 Atk. 385.

⁶ *Durn. & E.* 610.

⁶ *Thomas v. Phelps*, 4 Rus. 348.

regards that as done which ought to be done.¹ Jarman is of opinion that if the bargain for sale is afterwards rescinded, the devisee may hold for his own benefit. But, this view is contrary to the rule that a resulting trust, arising from construction, is not defeated even by parol evidence of a contrary intention by the testator. The view in question is also opposed to the general rule of construction, that the interpretation of a will is not to be affected by subsequent events.

The word "house" in a will is equivalent to mesuage, and will pass the land on which it is built, as also the curtelage, without the word "appurtenances."²

Where land was conveyed by a deed with all the buildings thereon, except the brick factory, the land on which the factory stood, and the water privilege appurtenant thereto did not pass by the deed.³ *A fortiori*, such a construction would prevail, where the conveyance was by will, exceptions in which are construed with the same liberality as grants.

A homestead let to tenants, and adjoining another homestead occupied by testator, will not pass under a devise of his "house-lot," though testator bought it for the purpose of annexing it to the house-lot.⁴

The word "appurtenances" in England, at the present day, will not pass land unless it consist of pleasure-ground, gardens, or the like, attached to a house. In America, the term is construed liberally,⁵ and may carry land.⁶

¹ Knollys v. Shepherd, 1 J. & W. 499. See Drant v. Vause, 1 Y. & C. C. 580. Hawkins on Wills, p. 39.

² Bennet v. Bettle, 4 Rawle, 339; Rogers v. Smith, 4 Penn. St. 93.

³ Allen v. Scott, 21 Pick. 25.

⁴ Perkins v. Jewett, 11 Allen, 9.

⁵ Otis v. Smith, 9 Pick. 293; see Leonard v. White, 7 Mass. 6.

⁶ Otis v. Smith, 9 Pick. 293; see 7 Mass. 6; 12 Pick. 441.

It thus appears that the word "appurtenances," in connection with "message," will not pass land in England, but, *semble* it will in the United States.

The terms, "occupy," "occupation," mean ownership, and not merely a condition of personal occupancy. A devise of the occupation of land or a house to A., therefore, passes the interest to A., and he need not reside on the premises.¹ A like rule of construction is applicable to deeds.²

A reference to occupancy, as a rule, is mere description, and will neither enlarge nor limit the previous terms of the devise. But though a devise of all "my farm in the occupation of B., called A.," will pass only the land so occupied, yet a devise of "my farm called A., in the occupation of B.," will pass the whole farm.³ However, a devise of a house to A., he to permit B. to occupy and dwell in it, gives B. no interest, but only a right of occupation personal to himself.⁴

A devise of premises, as now in the occupation of A., was held, in *Polden v. Bastard*,⁵ not to pass a privilege enjoyed by A., of drawing water from a pump on other premises of the testator, although it was the only means for obtaining water for the use of the premises devised.

Although words of occupation are not always restrictive, yet they sometimes have this effect, particularly where the bulk of the property is not in the occupation of the person described, and is not designated by a name comprehending the whole.⁶ "My farm on which I now live" will not comprise a lot with a dwelling-house let out as a distinct lot.⁷

¹ *Vide Rabbeth v. Lequire*, 4 De. G. & J. 406.

² *Rex v. Inhabitants of Eatington*, 4 T. R. 177.

³ See *Doe d. Beach, v. Earl of Jersey*, 1 Barn. & Ald. 550.

⁴ *Gardner v. Wagner*, Baldw. 454.

⁵ Law Rep. 1 Q. B. 156.

⁶ See *Allen v. Richards*, 5 Pick. 512.

⁷ *Jackson v. Meyer*, 13 Johns. 531.

Some of the American decisions narrow devises as much as the English cases do. For instance, in *Brown v. Saltonstall*¹ a testatrix owned in S. a house and garden, and several adjacent lots of land, with houses thereon, which were held by tenants. The phrase in her will, "I give unto M. my house and land in S. now occupied by me," was held not to pass the land and houses let to tenants. There the word land was held to mean garden. Yet the phrase "now occupied by me" might have been rejected as false description, or, rather, held to mean "the rents which are now received by me." In both countries, however, there is a growing disposition not to suffer the term house to convey anything beyond the curtilage thereto, unless the context is strong to the contrary.

"Lot" will not comprise a distinct detached lot with a dwelling-house on it.² "Farm" in England means land let on lease. In America it usually means the land managed by a single proprietor. Parol evidence would doubtless be admitted in America to show what was locally meant by the word farm. Yet it will not always pass a distinct lot,³ though it will pass a distant lot if once part of it, and never severed.⁴ The word "mill" carries the land under and near it, so far as the same has been always used with the mill.⁵

In England leaseholds⁶ will not, but copyholds⁷ will, pass under a devise of "farms." In the United States, the meaning of the word farm would probably depend on the local signification of the term.

¹ 3 Met. 423.

² *Jackson v. Meyer*, 13 Johns. 531.

³ *Aldrich v. Gaskill*, 10 Cush. 155.

⁴ *Aldrich v. Gaskill*, 10 Cush. 155.

⁵ *Whitney v. Olney*, 3 Mas. 280.

⁶ *Arkell v. Fletcher*, 3 Jur. 1099.

⁷ *Doe d. Belasyse v. Lucan*, 9 East, 448.

As words of mere affirmation and suggestion do not restrict, so neither will they extend, the meaning of a devise. Therefore, a devise of lands at A., in the parish of B., "which I purchased of C.," will not include lands not at A., though purchased of C.¹

A term or lease for years is a chattel, and passes as personalty.² The word "effects" will sometimes pass real estate.³

The phrase "worldly goods of all sorts and kinds" has been held to comprise only personalty.⁴ This case shows that the distinctive conveyancing used for land in both deeds and wills cannot be too soon abrogated. On the other hand, personalty ought to be endowed with every capacity to support a remainder which land has. These reforms, together with the adoption by statute in every State of a presumption that every gift by will is of the full property, unless a contrary intention appears, would leave our testamentary law in a very sound state. The courts already ignore the ultra technical force given in England to the rule in *Shelly's* case.

§ 2. *Terms of bequest—Personal terms.*

The word "goods," like "land," is a term of the most comprehensive signification, and, if uncontrolled by the context, will pass all personalty, whether in possession or action. But a bequest of goods at a particular place will only pass the goods there that *savor of locality*, as furniture, plate, &c., bank-notes and ready money, but

¹ *Doe d. Tyrrell v. Lyford*, 4 Mau. & S. 550.

² *Brewster v. Hill*, 1 N. H. 350.

³ *D'Almaine v. Moseley*, 21 Eng. L. & Eq. 184; *Smith v. Dunwoody*, 19 Ga. 238.

⁴ *Bradford v. White*, 6 Whart. 236.

not bonds or choses in action.¹ In America, however, no such distinction would now probably be taken between bank-notes and bonds, or other choses in action, evidenced by written securities, though it is doubtful that the term "goods" would be applied here in a difficult case to either bank-notes or bonds.

Household goods will pass all articles of household not consumed by the enjoyment, such as plate, pictures hung up, running horses, &c., but not goods kept there for purposes of trade or victuals.²

The phrase "goods and chattels" has a less extensive primary signification than the term "effects," which includes choses in action, money, shares in the public funds,³ and chattels real.⁴ In practice, however, owing to the force of the context, all these phrases will be virtually synonymous.

"Other goods" will not pass ready money, cash and bonds, if there is a residuary clause. For this would then be rendered nugatory; but the courts endeavor to effectuate both particular and residuary dispositions.

The term "effects," unaided by the context, carries only personalty.⁵ It was not so from the beginning, however; and the earlier cases on this point are certainly the more solid in point of sense. The law, nevertheless, is now settled the other way in England. But it is doubtful whether the American courts would not construe the phrase "all my effects," or "all my worldly goods," as equivalent to "all my property."⁶

¹ See Perkin's Note to 1 Jarm. 691.

² *Kendall v. Kendall*, 4 Russ. Ch. C. 360.

³ *Re Heirne v. Wigginton*, Mad. & Geld. 119.

⁴ *Mullins v. Smith*, 1 Drew & Sm. 204; s. c. 8. W. R. 739; see 3 Russ. 467; and Redfield's Comments thereon, vol. II, 102.

⁵ *Doe d. Haw v. Earles*, 15 M. & W. 450.

⁶ See *Wheaton v. Andrews*, 23 Wend. 452; *Harper v. Blean*, 3 Watts, 471; 2 Redfield on Wills.

“Household effects” is still more comprehensive than “household goods,” and will pass even articles consumed by the enjoyment, such as wines, books, but not a pony or a cow, a watch, or a gun, unless it is used for domestic defence.¹ “Personal property” carries half pay.²

The phrase, my “fortune,” is confined to personalty.³ General words will be the more readily extended in meaning if there is no residuary clause. General phraseology will not be restricted to previous particular articles, if such a construction will lead to a partial intestacy⁴ on account of the absence of a residuary clause, or other disposition of the property in question.⁵

In *Peppin v. Ellison*,⁶ it was held that the word property does not include choses in action, although the word estate comprises them.

“In-door moveables” will not pass promissory notes,⁷ but fixtures in a leasehold house belonging to the testator will pass under a devise of furniture.⁸

Money comprises all documents payable to bearer. Of course, the term may be used by the testator to pass all his personal estate.⁹

A gift of “money” has been held in England not to pass stocks in the public funds.¹⁰ This decision is highly technical, and seems to be unsound. It is also opposed to *Waite v. Coombes*.¹¹ The term “money” in

¹ 1 Sim. & Stu. 189.

² *Wood v. George*, 6 Dana, 343.

³ *Maitland v. Adair*, 3 Ves. 231.

⁴ *Gibbs v. Lawrence*, 7 Jur. n. s., 137.

⁵ *Browne v. Cogswell*, 5 Allen, 556; but see *Delamater's Estate*, 1 Whart. 362.

⁶ 12 Ired. 61.

⁷ *Penniman v. French*, 17 Pick. 404.

⁸ *Paton v. Shepherd*, 10 Sim. 186.

⁹ *Stratton v. Hillas*, 2 Dru. & War. 51.

¹⁰ *Lowe v. Thomas*, Kay, 369.

¹¹ 5 De G. & Sm. 676.

America would doubtless pass all debts, annuities, stocks and securities belonging to the testator. The phrase "ready money" is, perhaps, usually different in meaning. It will not include unreceived dividends on stock in England.¹ The term "money," however, used in a residuary clause, will be as extensive in meaning as the funds forming the residue.²

"Money" does not pass money due.³ Yet, a note is sometimes deemed "money."⁴ A specific bequest of a chest does not pass the money in it.⁵

"All of every thing on hand," in connection with a bequest of furniture, &c., will not pass promissory notes and choses in action.⁶

"Ready money" has been held in one case to pass dividends due on stocks, but not rents or interest due on a mortgage.⁷

A bequest of money "to be taken out of such property as the legatee shall think proper" will not entitle him to elect to go on the realty.⁸ But, if the legatee has an unlimited choice as to the quantity of interest he may take, he can appropriate the whole property in question.⁹ Moneys is only equivalent to money, and will denote merely cash, and not things in action.¹⁰

The term "money" in the United States,¹¹ but not in England,¹² passes promissory notes of every descrip-

¹ *May v. Grave*, 5 De G. & Sm. 462; *contra*, *Fryer v. Ranken*, 11 Sim. 55.

² *Grosvenor v. Durston*, 25 B. 97; see *Ommaney v. Butcher*, T. & T. 260.

³ *Beck v. McGillis*, 9 Barb. 35.

⁴ *Richmond v. Vanhoof*, 3 Ired. Ch. 581.

⁵ *Smith v. Jewett*, 40 N. H. 513; see *Richmond v. Vanhook*, 3 Ired. Ch. 581.

⁶ *Young v. Young*, 3 Jones Eq. 216. ⁷ *Fryer v. Ranken*, 11 Sim. 55.

⁸ *Fisk v. Cushman*, 6 Cush. 20. ⁹ *Garrison v. Eborn*, 3 Jones Eq. 228.

¹⁰ *Mann v. Mann*, 14 Johns. 1; see *Beck v. McGillis*, 9 Barb. 35.

¹¹ *Morton v. Perry*, 1 Met. 446.

¹² See *Roberts v. Kuffin*, 2 Atkin, 113; *Mann v. Mann*, 1 Johns. Ch. 231.

tion, money in bank¹ and stocks, if the testator has no other personalty.² "Goods and moveables" may comprise money or bonds.³ "Rents in arrear" may comprise rents received, if termed rents in memoranda allocating them to the legatee.⁴

A gift of securities for money passes bills, notes, stock in the public funds, railway debentures, and probably also shares in joint-stock companies, in the United States. A gift of "securities for money" or "mortgages" will also pass all the beneficial interest in mortgages.⁵ It was held, however, by Kindersley, V. C., *in re Cautley*,⁶ that a bequest of "money on securities" does not pass the legal estate in a mortgage. If the legatee has any active duty to perform, indeed, in realizing the amount due, he will be deemed to take the legal estate,⁷ and the general residuary clause will pass the legal estate in a mortgage even in England,⁸ and will operate as the execution of a power.⁹

A mortgage will pass under a bequest of personalty any time prior to the foreclosure becoming absolute.¹⁰ A bequest of the principal of a bond does not pass the interest due.¹¹

A bequest of the interest of a certain sum, no fund being allocated to that purpose, is equivalent to an annuity,¹² and "interest and dividends" in the

¹ *Dabney v. Cottrell*, 9 Grat. 572.

² *Chapman v. Reynolds*, 6 Jur. N. S. 440.

³ *Jackman v. Robinson*, 1 Yates, 101.

⁴ *Wadsworth v. Ruggles*, 6 Pick. 63.

⁵ *Hawkins on Wills*, 49; *Knight v. Robinson*, 2 K. & J. 503.

⁶ 17 Jur. 124; see *Renwize v. Cooper*, Mad. & Geld. 371.

⁷ *Re Arrowsmith's Trusts*, 4 Jur. N. S. 1123; see *Re Caldwell's Trusts*, 19 L. T. N. S. 377.

⁸ *Stevens Will Law Rep.* 6 Eq. 597.

⁹ *Bangs v. Smith*, 98 Mass. 270.

¹⁰ *Fay v. Cheney*, 14 Pick. 399.

¹¹ *Stultz v. Keser*, 2 Ired. Eq. 538; *Richmond v. Vanhook*, 3 Ired. 581.

¹² *Swett v. City of Boston*, 18 Pick. 123; see, however, *Routh v. Ammerman*, 4 Bradf. 129.

funds will comprise dividends due at testator's decease.¹

A bequest of debts passes bonds, the period for fulfilling the conditions of which has expired.² A bequest of any money which the testator might die possessed of was held, in *Petty v. Wilson*,³ to include money due on a policy on testator's life. But, it is doubtful whether this decision would be followed in America. However, under a bequest of "whatever debts shall be due me at my decease," a bill of exchange and a cash balance in the hands of testator's banker will pass.⁴

Certain terms are sometimes construed rigidly enough in America. Thus, although a mortgage passes under a bequest of personalty any time before the mortgage becomes absolute,⁵ yet money does not pass a debt, a mortgage does not pass a contract for sale,⁶ and a bequest of the interest of a certain sum is not equivalent to an annuity, if a fund is specified, though an indefinite gift of dividends gives the absolute property in stock,⁷ a watch is not comprised in the phrase wearing apparel, and interest does not pass by a bequest of the principal of a bond.⁸

Utensils will not pass plate or jewels, but "stock of a farm" will include growing crops.⁹

Canal shares are not "securities."¹⁰ The phrase "shares or interest," will not carry a policy of insurance in the company named.¹¹

¹ *Shore v. Weekly*, 13 Jur. 1022.

² *Essington v. Vashon*, 3 Mer. 434.

³ Law Rep. 4 Ch. App. 574.

⁴ See 2 Wms. Exrs. 2d Am. ed. c. 2, § 4, p. 854, *et seq.*

⁵ *Fay v. Cheney*, 14 Pick. 399.

⁶ *Beck v. McGillis*, 9 Barb. 35.

⁷ See 2 Wms. Exrs. 2d Am. ed. c. 2, § 4, p. 854, *et seq.*

⁸ *Sultz v. Kiser*, 2 Ired. Eq. 538.

⁹ 6 East, 604 n.

¹⁰ *Huddleston v. Goldsbury*, 11 Jur. 464.

¹¹ *Harrington v. Moffatt*, 4 De G. M. & G. 1.

Bound manuscripts will pass under a devise of books.¹ Books, however, sometimes pass under a bequest of copyright, and not under a residuary gift of books on hand. Chancellor Kent bequeathed the copyright of his Commentaries, with the right of renewal of all previous and future editions. The residuary clause comprised unsold Commentaries on hand. At the date of the will the Chancellor had some Commentaries on hand, which were sold before he died. A new edition, which was in course of being printed when he died, was held to pass under the specific and not under the residuary bequest.²

An exception to a bequest will, as a rule, enlarge the bequest to mean all things answering to the description, except the thing excepted. The case of *Fleming v. Brooke*,³ which militates to the contrary, as regards choses in action, is highly technical, and is contradicted by other decisions. It would probably not be followed in America.⁴

"Residue" sometimes means not the remainder of the whole personalty, but what is left of a particular fund after satisfying certain special gifts.⁵ But, the meaning of the word "residue" will not be usually thus curtailed. On the contrary, terms of limited meaning, such as goods, money, &c., will frequently pass the residue.⁶

A residuary bequest carries not only what has not been specially disposed of, but also what lapses, or has

¹ *Willis v. Curtois*, 1 Beav. 189.

² *Hone v. Kent*, 6 N. Y. 380; reversing s. c. 11 Barb. 315; see Part I, p. 164.

³ 1 Sch. & Lef. 318.

⁴ See *Hotham v. Sutton*, 15 Ves. 319; Sumner's note.

⁵ 1 Jarm. 702.

⁶ See 1 Jarm. 703, *et. seq.*

been sought to be conveyed by a void legacy.¹ A residuary disposition of realty and personalty," not hereinbefore specifically disposed of," will comprise specific legacies that have lapsed, the word "specifically" being construed "particularly."² But, where a portion of a residuary clause fails, the property lapses, and does not fall into the remaining residue. It is not likely that this rule will be acted on in America. There is no more reason for the exclusion of the lapsed share of one residuary legatee from the residue of the other residuary legatees than there is for the exclusion of a particular lapsed legacy from the general residue. Neither instance, however, affords any fulcrum for the application of extrinsic evidence.

A residuary bequest is sometimes essentially a particular legacy and is so construed. As such, it will only abate rateably with other particular legacies on a deficiency of assets.³

¹ *James v. James*, 4 Paige, 115; *Gore v. Stevens*, 1 Dana, 201, 206; *Hart v. Marks*, 4 Brad. 161.

² *Roberts v. Cooke*, 16 Ves. 451.

³ *Dyose v. Dyose*, 1 P. Wms. 305.

CHAPTER V.

DEVISES OF REALTY.

A devise of land to A. gives him only a life estate,¹ unless a local statute provides to the contrary. But a devise to A. with any words of perpetuity, such as "forever," or "to him and his blood," or "to him and his successors," will give him a fee.² Words of perpetuity in a devise are thus tantamount to words of limitation.³ Accordingly, a succession of life estates is sufficient to indicate a general intention to give a fee tail.

In those States that have not legislated expressly upon the subject the old rule prevails. But it will probably be neutralized by slighter evidences of intention to the contrary in the will than are requisite in England. If, however, the context leaves the question uncertain, the presumption in favor of the heir must prevail, and the devisee will be held to take only for life or a limited interest. Parol evidence is wholly inadmissible to determine this question, notwithstanding what Sir James Wigram has stated in his Fifth Proposition.

The rule that a general devise of land gives⁴ the devisee only a life estate has been abrogated by statute in South Carolina and in Massachusetts as to wild or

¹ *Newton v. Griffith*, 1 Har. & G. 111; *Wheaton v. Andress*, 23 Wend. 452.

² *Beall v. Holmes*, 6 Har. & J. 205; *Johnson v. Johnson*, 1 McMul. (S. C.) Eq. 346; *Cooke v. Husbands*, 11 Md. 492.

³ *Denn v. Gaskin*, 2 Cowp. 660.

⁴ St. 1824. *Whaley v. Jenkins*, 3 Des. Eq. 80.

uncultivated lands,¹ in New York,² Ohio, 1834; New Jersey, 1784; Virginia, 1787; Vermont, 1839; Kentucky, Alabama, South Carolina, North Carolina, Maryland, Tennessee, Mississippi, and Missouri. In these States a general devise of land is now presumed to pass a fee if the context is silent on the point.³

The rule of the common, or rather equitable, law that a devise of land conferred only a life estate has been reversed in England by, 1 Vict. c. 26, § 28, and a natural rule of construction substituted instead. In those states that have a similar law, a general devise will now pass the fee, if the context is not adverse, and the statutory presumption will not be negatived by the grant of an annual allowance for repairs.⁴

It is greatly to be regretted that a change similar to that effected by the Revised Statutes of New York⁵ has not been adopted by all the States, and a devise of land been held to denote the fee, unless the context speaks to the contrary. For, though the American courts will probably exclude the old English rule on less grounds than would have moved the English judges to such a construction prior to 1 Vict. c. 26, yet that old rule is still productive of violence to the testator's intent in many cases. The rule itself is almost always opposed to the testator's wishes, and unless he indulges in what may appear to him to be surplusage, the intended beneficiary may get only a portion of the benefit designed for him. There is obviously more reason for abolishing this rule than the almost equally perplexing rule in

¹ *Sargeant v. Towne*, 10 Mass. 303.

² Rev. Stat. vol. I, 748, § 1; Id. vol. II, 57, § 5.

³ Lomax's Digest, vol. III, 177; see, further, *Fay v. Fay*, 1 Cush. 93; *Ellis v. Essex Merrimack Bridge*, 2 Pick. 243; *Wilent v. Calnan*, 98 Mass. 75; *Payton v. Smith*, 4 McCord, 476.

⁴ *Fuller v. Yates*, 8 Paige, 325; 4 Kent Com. 535, *et seq.*

⁵ Vol. I, 748, § 1; Id. vol. II, 57, § 5.

Shelly case, as applied to wills, since the use of the phrase "heirs of the body" implies some technical knowledge on the part of the testator or his adviser. In many of the American States the English rules of testamentary construction, as existing prior to 1 Vict. c. 26,¹ have been unaltered by statute. In Massachusetts, however, "all the residue and remainder of my real estate" always passed a fee.² So, if the devisee was personally charged with the payment of money to a third person.³ And where the value of the estate was estimated by the testator as nearly that of the fee, it was held to pass.⁴ Similar rules doubtless prevail in all the States that have not yet abandoned the old rule, which construes a general devise of land to confer only a life estate.

A devise of uncultivated land carries the fee, because the cost of clearing it is equivalent to a charge of debts, and there is no income to be derived from the use of such land.⁵ The condition of the land in such cases may be proved by parol in aid of the construction. Any English case decided prior to 1 Vict. c. 26 that gave the devisee a fee will be followed here. But, the American courts will in most cases of a doubtful nature deal more liberally with the devisee than the English courts would have done prior to the act mentioned, although our courts will not treat the rule in question altogether as lightly as they do the rule in Shelley's case.⁶

In those States which have not altered the old testamentary rules of construction, the heir can only be disinherited by plain words of devise or else by neces-

¹ 2 Redfield on Wills, 335.

² *Parker v. Parker*, 5 Met. 134; *Godfrey v. Humphrey*, 18 Pick. 537.

³ *Tracy v. Kilborn*, 3 Cush. 557.

⁴ *Baker v. Bridge*, 12 Pick. 27; see *Cook v. Holmes*, 11 Mass. 528.

⁵ *Sargent v. Towne*, 10 Mass. 303; *Russell v. Elden*, 3 Shep. 193.

⁶ See *Beale v. Holmes*, 6 Har. & J. 205; *Lindsay v. McCormack*, 2 Marsh, 229; *Smith v. Poyas*, 1 Des. 156.

sary implication.¹ A devise of land, therefore, in such States to A. gives him only a life estate. Under a devise to the heir, he also takes here by descent, as in England before the passing of the Inheritance Act. But, if the estate given to the heir differs from the interest he would take by descent, he will take under the will by purchase.²

In those States where statute law has not altered the old doctrine, it has been but little modified by construction, and in such States, if there is any doubt as to whether the will contains words of limitation or of an equivalent nature, the common law rule will generally be applied, and the devisee will only take for life. For, heirs are favored in law, and get the benefit of any doubt affecting their rights.³

Most of the leading cases on wills are each so peculiar in its circumstances that very little reliance can be placed on a precedent, unless it is exactly in point, which, indeed, rarely or never occurs. In Pennsylvania, the English rules have been adopted as they existed prior to 1 Vic., c. 26.⁴ Therefore, in that State, a devise of land gives only an estate for life; but, on the other hand, any word importing in any way the fee will

¹ *Roosevelt v. Heirs of Fulton*, 7 Cow. 71; *Jackson v. Burr*, 9 Johns. 104.

² *McAfee v. Gilmore*, 4 N. H. 391; *Fogg v. Clark*, 1 N. H. 163; *Enlaws v. Enlaws*, 3 Marsh. 228.

³ See *Roberts v. Ogbourne*, 37 Ala. 174; *Parish v. Parish*, Id. 591; *Cleveland v. Spilman*, 25 Ind. 95; *Lewis v. Smith*, 6 Jones, Eq. 347; *Burke v. Chamberlain*, 22 Md. 308; *Ferris v. Smith*, 17 Johns. 221; *Olmstead v. Olmstead*, 4 N. Y. 56; *Shutt v. Rainbow*, 57; Penn. St. 149; *Bacon's Appeal*, Id. 504; *Turner v. Kittrell*, 1 Winst. Eq. 39; *Doe v. Dill*, 1 Houston, 398; *Physick's Appeal*, 50 Penn. St. 128; *McKenzie v. Jones*, 39 Miss. 234; *Steiner v. Koll*, 57 Penn. St. 123; *Quillman v. Custer*, Id. 125.

⁴ See *Hall v. Dickinson*, 31 Penn. St. 94; *Naglee's Appeal*, 33 Penn. St. 89; *McKee v. McKinley*, 33 Penn. St. 92; *Musselman's Estate*, 39 Penn. St. 469.

pass it. In that State, however, a condition, that, if a devisee died unmarried or without issue, his interest should revert to the general estate, has been held not to prevent the devisee from taking the fee where the land was charged with debts and annuities.¹

Even prior to 1 Vict., c. 26, § 28, a direct or contingent charge of debts implied in England that the devisee took a fee, no matter how small the debts were.² This rule obtains in those States which have not passed any act analogous to 1 Vict., c. 26. A distinction also prevails in these States between a charge on the person of the devisee and one on the land in respect to the point now under review. A charge of the former kind implies a fee in the devisee, but a charge of the latter kind implies only a feehold.³ This presumption, however, is not universally recognized in America as conclusive.⁴

Where a charge is imposed on the person of a devisee, and not merely on his land, if the devisee did not take the fee, the gift might be to him a source of loss and not a gain. But, where the charge is confined to the land, this is quite consistent in all cases with the devisees only taking a life interest.⁵ As the principle of these rules is that a different construction might entail loss and not gain on the devisee, therefore, any other condition as that the devisee shall convey his own fee to J. S. gives him the fee in the land devised to him, if the context implies nothing to the contrary.

¹ Schoemaker v. Stockton, 37 Penn. St. 461.

² 2 Jarm. 248.

³ Fox v. Phelps, 17 Wend. 393; Jackson v. Merrill, 6 Johns. 185; Jackson v. Bull, 10 Id. 148; Jackson v. Martin, 18 Id. 31.

⁴ Lithgow v. Havenagh, 9 Mass. 165.

⁵ Wright v. Page, 10 Wheat, 204; see Ferguson v. Zepp, 4 Wash. C. Ct. 645.

Gibson *v.* Horton¹ is to that effect. A devise for life, with power to convey or devise the fee, does not come within the principle stated, and gives the devisee only an estate for life.² He also takes only for life, if the incumbrance or annuity is merely a charge on the land,³ or the land is only devised subject to it. For, in such circumstances, the land may possibly never be resorted to by the owner of the charge. The devisee gets only a life estate if the gift is to him after payment of the charge. For, owing to the distinctness in this case between the charge and the devise, the charge throws no light on the quantity of interest intended to be devised by the testator.

If there is a devise, though it be only for life, over, on the death of the devisee under age or under age and without issue, this enlarges the devise to a fee by implication.⁴ But a different construction obtains, if the ulterior limitation is not connected with the death of the first devisee.⁵

If the first devise is in fee, and the limitation over, whether in the same will or in a codicil, is general, the ulterior grantee takes only for life, according to the rule which deprives an heir of his common law rights only so far as is absolutely necessary to give some effect to the words of the will.⁶ But a devise to A. in trust for B. in fee, or to A. in fee in trust for B., gives both A. and B. fees at law and in equity respectively,⁷ especially if the general purposes of the trust imply that the trustees take a fee.⁸

¹ 5 Har. & J. 177.

² See *Doe v. Howland*, 8 Cow. 277.

³ 2 Jarm. 251; *Andrew v. Southouse*, 5 T. R. 292; *Burton v. Powers*, 3 Kay & J. 170; *Denn v. Mellor*, 1 B. & P. 247.

⁴ 2 Jarm. 250; *Frogmorton v. Holyday*, 3 Burr. 1618.

⁵ *Roe v. Blackett*, 1 Cowp. 235. ⁶ *Roe v. Holmes*, 2 Wils., 80.

⁷ *Challenger v. Shepherd*, 8 T. R. 597; *Shaw v. Weigh*, 2 Str. 798.

⁸ *Knight v. Selby*, 3 M. & G. 92; see *infra* chapter 15, "Limitations to trustees."

A charge of debts which may be paid out of the personalty, will not give a fee by implication in America.¹ But a charge equal to half the value of the land is sufficient to pass a fee.² So is a charge for the purpose of supporting testator's mother.³ But an express estate for life is not enlarged by a charge for debts.⁴ In *Barheydt v. Barheydt*,⁵ the devisee, being required to give money to another, was held to have taken the fee.

Where a testator charges a devisee with the payment of debts and legacies, the charge attaches to the estate⁶ also.

The rule that a devisee of land takes only an estate for life, where there is no statute on the point, is a rule of construction, and not of law. Therefore, other expressions in the context may enlarge the estate of the devisee to a fee. No technical word or phrase, such as "heirs," is requisite, for in a will a fee may be conveyed by such words as "estate," "for ever," "property," "real effects," "inheritance," "reversion," (but not "remainder,") "in fee simple," "to him and his executors," "all I am worth," "all right and title," "I make him my heir," "to do what he likes with it," &c.⁷ The word "residue" was held in *Rathbone v. Dyckman*,⁸ to carry the fee. Even a devise of my estate at A. will pass a fee, although the word estate, when used in connection

¹ *Jackson v. Harris*, 8 Johns. 141; *Jackson v. Babcock*, 12 Johns. 389; *Tanner v. Livingston*, 12 Wend. 83; *Heard v. Horton*, 1 Denio, 165;

² *Fox v. Phelps*, 20 Wend. 437.

³ *Jackson v. Martin*, 18 Johns. 31.

⁴ *Tanner v. Livingston*, 12 Wend. 83; see *Merritt v. Brantley*, 8 Fla. 226; *Henry v. Gorterman*, 1 Met. (Ky.) 465.

⁵ 20 Wend. 576.

⁶ *Sands v. Champlin*, 1 Story C. Ct. 376.

⁷ *Baker v. Raymond*, And. 51; *Jenkins v. Lord Clinton*, 26 Beav. 108 121.

⁸ 3 Paige, 9.

with locality, indicates a material and not a legal interest.¹ The original rule of the common law, however, being unsound, it is sought to be cured by the courts by means of an equally unwarranted straining of slight expressions in the context so as to give the devisee the fee.²

A devise of the rents of an estate will pass the fee,³ on account of the use of the word "estate," which always passes a fee, except when the word is obviously used as synonymous with a previous limited gift,⁴ or is inconsistent with other limitations in the context.⁵

A devise of premises in fee to A., with the exception of part thereof to B., gives B. the fee in the excepted part. The rule on this point proves or explains the exception.⁶ A like principle applies to estates given in the alternative or upon condition.⁷

A devise of land without words of perpetuity will also pass the fee if the introductory clause and frame of the will show that the testator intended to dispose of all his property.⁸

In Ohio, a devise of "the plantation on which I now live," has been held to pass the fee. And yet, prior to the change in the law made by the Revised Statutes of New York, a devise to testator's widow for life, and on her death the land to be "equally divided" between

¹ 2 Redf. 328.

² *Fox v. Phelps*, 17 Wend. 393; s. c. aff'd, 20 Wend. 437; *Earl v. Grim*, 1 Johns. Ch. 494; *Van Derzee v. Van Derzee*, 30 Barb. 331.

³ *Stewart v. Garnett*, 3 Sim. 398; *Craig v. Craig*, 3 Barb. Ch. 76; *Patterson v. Ellis*, 11 Wend. 259; *Smith v. Post*, 2 Edw. 523.

⁴ *Doe d. Clayton*, 8 East, 141; *Doe d. v. Clarke*, 1 Cr. & Mees. 39.

⁵ *Key v. Key*, 4 De G. M. & G. 73; *Martin v. McCausland*, 4 Ir. Law, 340.

⁶ *Doe d. v. Lawton*, 4 Bing. N. C. 455.

⁷ See *Greer v. Armsteed*, Hob. 65; *Shaillard v. Baker*, Cro. Eliz. 774; *Bentley v. Oldfield*, 19 Beav. 225.

⁸ *Vanderzee v. Vanderzee*, 36 N. Y. 231; compare with this case *Van Dyke v. Emmons*, 34 Id. 186.

testator's two sons, was held to give the sons only life estates.¹

In some of the States the terms "property" and "estate" have not been construed as liberally as in England, where standing alone they always passed the fee.² But a devise of land for a permanent purpose—as to establish schools, passes a fee, on the ground, probably, that the legal estate is always commensurate with the trust intended to be raised thereout.³

In *Jackson v. Housel*,⁴ a fee was held to pass under the phrase, "My property, after my debts are paid, I leave and bequeath to my beloved wife, and wish her to educate my daughters." A devise of the use for life, with a power of appointment, was held to give the fee in *Jackson v. Coleman*;⁵ the rule is different if the power is to dispose of by will only.⁶ A charge also, of course, often enlarged the devisee's estate to a fee in New York before the passing of the Revised Statutes.⁷ As to the effect of ulterior limitations in limiting the quantity of interest of the particular tenant, see *Bradley v. Cartwright*.⁸

A. devised to his son an estate, W., "to do and dispose of as he may think proper." By a subsequent clause he devised estate H. without words of limitation. The will also directed the son to pay certain legacies. A further clause devised all the estate of the testator to

¹ *Edwards v. Bishop*, 4 N. Y. 61; s. p. *Jackson v. Bull*, 10 Johns. 148; *Liffen v. Eldred*, 2 Barb. 130.

² *Pippin v. Ellison*, 12 Ired. 61; *Hurdle v. Outlaw*, 2 Jones Eq. 75; see *Clark v. Hyman*, 1 Dev. 382.

³ *Bell County v. Alexander*, 22 Texas, 350; see *infra*, chapter fifteen.

⁴ 17 Johns. 281; compare *Wheaton v. Andress*, 23 Wend. 452.

⁵ 2 Johns. 391.

⁶ *Doe v. Howland*, 8 Cow. 277.

⁷ *Dumond v. Stringham*, 26 Barb. 104.

⁸ Law Reps. 2 C. P. 511.

his wife during her widowhood. It was held that the son took a fee in both estates.¹

In *Lippett v. Hopkins*,² the devise was to A. "and if he shall die without an heir before he shall arrive at the age of twenty-one years, then all that is to him herein bequeathed, to be equally divided amongst his brothers and sisters, or their heirs." It was held that A. took a fee simple, with an executory devise over to his brothers and sisters. The report of this case contains rules for construing devises without words of limitation, and enumerates the leading cases on this point.

In *Abbott v. Essex County*,³ the devise was "if either of my sons, John and Jacob, should happen to die without any lawful heirs of their own, then, the share of him who may first decease, shall accrue to the other survivor and his heirs." The court held that this devise provided for a definite failure of issue, and that, by way of executory devise, the share of the son first dying without issue in the life-time of the other, was to go over to that survivor, and that, subject to this contingency, each took a fee simple.

A devise to testator's wife, "for her use and comfort, and to be disposed of as she pleases, at or before her decease, when no doubt she will make such disposition of the same among our children, as she may then think most proper," has been held to give the wife a fee simple, without any trust for the children.⁴

Jarman considers that where there is a devise of both realty and personalty to trustees, but the trusts declared relate only to the personalty, there is a resulting trust of the realty to testator's heir. But this is very doubt-

¹ *King v. Ackerman*, 2 Black. 408.

² 1 Gall. 454; 1 St. Circ (R. L.) 1813.

³ *Circ. Mass.* 1854; 2 *Curt. C. Ct.* 126.

⁴ *Kenter v. Jenks*, 43 *Penn. St.* 445.

ful. It would hardly be so decided in America. The case of *Dunnage v. White*,¹ cited by Jarman, is not really any authority in behalf of the proposition advanced by him. In such cases, the trustees most probably take a fee, and the trusts, too, are charged by implication on the realty. This question will be more fully discussed, *infra*, in chapter fifteen, on "Limitations to Trustees."

In *Engliss v. Sailors' Snug Harbor*,² a testatrix devised "all her estate, real and personal, wheresoever and whatsoever, in law or equity, in possession, reversion, remainder, or expectancy, unto her executors, and the survivor of them, his heirs and assigns, for ever," upon certain designated trusts. It was held, that under the Statute of Wills of New York, all the rights of the testatrix to real estate, held adversely at the time of her decease, passed to the devisees.

A devise without words of inheritance, but directing that if any of the testator's heirs, of whom the devisee was one, should die without lawful issue, his part should be equally divided between the survivors, implies that in case of issue these would take, and thus passes a fee.³ In *Dumond v. Stringham*,⁴ a provision that if the devisee should die during the widowhood of the testator's wife, she should have the property during her widowhood, and no longer, was held not to be inconsistent with an intention to devise a fee. It was held, in *Wright v. Page*, that "tenement" does not pass a fee.⁵

In *Pocock v. the Bishop of Lincoln*,⁶ a testator

¹ 1 Jac. & Walk. 583; see 1 Jarm. 680, note.

² 3 Pet. 99.

³ 26 Barb. 104.

⁴ 3 Br. and B. 27.

⁵ 18 Johns. 368.

⁶ 10 Wheat. 204.

devised to his son the "perpetual advowson" of the living then held by the son. It was held that the son only took a life interest, and that the word "perpetual" related to the quality, not the quantity, of the estate devised. If the son vacated the living or was translated to a see, doubtless the will would then operate. The case would palpably have been one to be elucidated by parol evidence if such could be admitted to explain the quantity of interest intended to be given. The phrase perpetual advowson, however, does not carry the fee if the bequest is to a stranger; and the question was whether the fact that the donee had already a life interest should affect the construction. It must be admitted that the case can be supported on strict principle.

Unless the intention to give a fee is *plain*, such an estate will not pass.¹ The American law thus favors the heir by analogy to the common law rule. Therefore a devise to the testator's wife of "all the rest" of his lands, &c., has been held to give her only a life estate.² This ruling, however, it must be confessed, is worthy of the era of *Perrin v. Blake*.³

So in *Shriver v. Lynn*,⁴ the devise was to the testator's brother "E. M., during his natural life, of 100 acres of land. In case he should have heirs lawfully begotten, I then give and bequeath the 100 acres of land to him, the said E. M., his heirs and assigns forever." It was held that E. M. took a life estate only, which, on the happening of the contingency, might be converted into a fee simple, and not a conditional fee.

In *Page v. Wright*⁵ the devise was "to M. of all the rest of my lands and tenements whatsoever, whereof I

¹ *Wright v. Page*, 10 Wheat. 204.

² *Ib.*

³ 4 Burr. 2579.

⁴ Supreme Ct. 1844, 2 How. 43.

⁵ 4 Wash. C. Ct. 194, 3d Circ. (N. J.) 1822.

shall die siezed in possession, reversion or remainder, provided that she has no lawful issue. Item—I give to M., whom I also make my sole executrix, all and singular my lands, messuages and tenements, by her freely to be possessed and enjoyed.” It was held that M. took an estate for life only. Yet, the superabundance of general words here, and the implied provision for M.’s issue, denoted an intention to pass a fee.

E.,¹ being seized of lands in the State of New York, devised the same to his son Joseph in fee, and other lands to his son Medcef in fee, and added, “It is my will that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, then I give all the property to my brother John E. and my sister Hannah J., and their heirs.” Joseph, one of his sons, died without lawful issue in 1812, leaving his brother Medcef surviving, who afterwards died without issue. It was held that Joseph took an estate in fee, defeasible in the event of his dying without issue in the lifetime of his brother, and that the limitation over was good as an executory devise, and on the death of Joseph vested in the surviving brother Medcef.

Under the decisions of the Courts of New York,² such a devise does not vest in A. and B. an estate tail liable to be converted into a fee simple absolute by the statute of 1786. The limitation over is good as an executory devise, and A. and B. each take an estate in fee, defeasible in the event of either dying without issue in the lifetime of the other.

Under a devise of all the estate called Marrowbone,

¹ Supreme Ct. 1827, *Jackson v. Chew*, 12 Wheat. 153; followed, 1828, in *Waring v. Jackson*, 1 Pet. 570.

² 1 Johns. 440; 3 Id. 229; 10 Id. 12; 11 Id. 337; 16 Id. 382; 20 Id. 483.

in the County of Henry, containing, &c., likewise one other tract of land in said county, called Horsepasture, containing, &c., it was held, on the general tenor of the will, that a fee passed.¹

For the principles which determine whether a devisee takes a fee simple or a fee tail, see *Lillibridge v. Adie*.²

Where a devisee whose estate is not defined is directed to pay debts, legacies or a sum in gross, he takes the fee.³

In *Hardy v. Redman*⁴ on a devise to the testator's executor in trust, to apply the income to the support of the widow, with power to sell the estate if the income should not be sufficient; the devisee was held to take a fee. A power of sale, however, attached to an express life estate, will not enlarge it to a fee.⁵

If the absolute interest is once clearly given, a limitation over will be void. But the words "heirs and assigns" do not necessarily prove that the absolute interest was meant to be given.⁶ If, however, the first legatee has absolute power of disposition, and the limitation over applies only to any residue undisposed of by the first legatee, and not to the whole interest, the generality of the first limitation will not be cut down to mean a limited interest, but will pass the absolute property, and the limitation over will be void.⁷ Of course, if the limitation over is not necessarily repugnant, but is limited on the event of the first taker dying under age

¹ Supreme Ct. 1805, *Lambert v. Paine*, 3 Cranch. 97.

² 1st Circ. (R. I.) 1816; 1 Mas. 224; *Arnold v. Buffum*, 2 Mas. 208, (Mass.) 1854; 1st Circ. (R. I.) 1854; *Crane v. Cowell*, 2 Curt. C. Ct. 178.

³ Supreme Ct. 1862, *King v. Ackerman*, 2 Black. 408.

⁴ 3 Cranch. C. Ct. 635; C. Ct. D. C. 1829.

⁵ 1 Dean v. Nunally, 36 Mass. 358.

⁶ *Woodham v. Maverick*, Vol. II. Law Mag. 487.

⁷ *Pinckney v. Pinckney*, 1 Brad. 269; *Ferris v. Gibson*, 4 Edw. 707.

and without issue, or on any other contingency within the line of perpetuity, this ulterior limitation is a valid executory gift.¹

If an estate be given to a person generally, with power of disposition, this is a fee. But if it be to him for life, with power to dispose of the remainder, he only takes an actual estate for life,² although by the exercise of his power he can appoint to himself in fee.

A devise of rents and profits has been often held to be equivalent to a gift of the land.³ The phrases land and rents and profits, however, may possibly be held not to be, coterminous in some of those States where, as in England, a general devise of land now passes the fee. For a devise of the rents and profits of certain farms may possibly be held to give the devisees only life estates, though, if the devise was of the land itself, they would take the fee.

A direct devise of rents and profits, however, has already been decided in New York to be exactly equivalent to a devise of the land itself,⁴ and will carry both the legal and beneficial interest therein to the extent that a devise of the land would do, since the passing of the Revised Statutes. Therefore, a devise of rents and profits there means a fee. Prior to the period mentioned, or if the "rents and profits" are given for a limited period only, they will, of course, denote only a limited interest.⁵

"Income" is "equivalent to" rents and profits.⁶ So are the words "use and improvement."⁷

¹ Trustees of Theo. Se. v. Kellogg, 16 N. Y. 83.

² Jackson v. Coleman, 2 Johns. 391; Jackson v. Robins, 16 Ib. 537-588.

³ Doe d. Goldin v. Lakeman, 2 B. & Ad. 30; Stewart v. Garnett, 3 Sim. 398.

⁴ Reed v. Reed, 9 Mass. 372; Anderson v. Greble, 1 Ashm. 136; Fox v. Phelps, 17 Wend. 393; Earl v. Rowe, 35 Me. 419, 420.

⁵ Fox v. Phelps, 17 Wend. 393-402.

⁶ Butterfield v. Haskins, 33 Me. 392.

⁷ Fay v. Fay, 1 Cush. 93.

"Net profits" mean "rents and profits" or the land itself.¹

When the devise relates directly to "rents and profits" there is rarely any difficulty. This, however, sometimes arises with respect to the meaning of the phrase when the rents and profits are directed to be applied to the raising of a charge. The early cases confined such a charge to the annual rents and profits; but the modern cases incline to authorizing a sale, especially if the payment of the charge is not deferred, but is immediate.²

There is no doubt that a trust to raise a charge out of the rents and profits to pay debts at once has always constituted a specific lien on the land itself, and will authorize a sale thereof.³ *A fortiori* if the trust is secured by a term,⁴ although, of course, the context may cut down the meaning of the phrase to denote merely annual rents and profits, notwithstanding the creation of a term to support the charge.⁵

The context or the circumstances of the testator may also show that the phrase "rents and profits" means the land itself, and where a testator directed renewal fines of leases to be raised out of the rents and profits, a sale was directed.⁶

But if the immediate payment of the charge, even if it be for legacies, is not required, the phrase will be sometimes held to mean, according to its grammatical sense, only annual rents and profits.⁷

¹ Earl v. Rowe, 35 Me. 414.

² See Schermerhorn v. Schermerhorn, 6 Johns. Ch. 70.

³ Green v. Belcher, 1 Atk. 506; Trafford v. Ashton, 2 P. W. 415; Allan v. Backhouse, 2 V. & B. 64; Bootle v. Blundell, 1 Mer. 232; Wilson v. Halliley, 1 R. & My. 590; Lingen v. Foley, 2 Ch. Cas. 205.

⁴ Bootle v. Blundell, 1 Mer. 232; Trafford v. Ashton, 1 P. W. 415.

⁵ Heneage v. Lord Andover, 3 Y. & J. 360.

⁶ Allan v. Backhouse, 2 V. & B. 64.

⁷ Small v. Wing, 5 Bro. P. C. Toml. 66; Heneage v. Lord Andover, 3 Y. & J. 360.

A bequest of an annuity or rent charge, not existing previously, confers only an interest for life, in England, even since 1838 (1 Vict. 26, § 28). However, if the rent charge or annuity be given to A. during the life of B., and A. dies before B., A.'s executor will still receive the annuity 'during B.'s life.¹ But if a fund, such as public stocks, be mentioned as the source of the annuity, it is then perpetual. See *Wilson v. Madison*² as to the distinction between a charge on a fund and a gift thereout.

"A gift, then, of the produce of a fund, whether particular or residuary, without limit as to time, is a gift of the fund itself."³ So, also, is a limitation of an annuity to one for life remainder over. The remainder man takes a perpetual annuity.

¹ *Savery v. Dyer*, Amb. 139.

² See 2 Y. & C. C. C. 372.

³ *Stokes v. Heron*, 12 Cl. & Fin. 161.

CHAPTER VI.

THE RULE IN SHELLEY'S CASE.

The Rule in Shelley's Case,¹ is an exception to the third class of contingent remainders described by Fearne.² The rule transmutes their nature, and changes them into vested interests in different persons from those designed by the grantor. The judges in early times, with their usual tendencies to construe interests as vested, considered that it was better to give a certain interest to the ancestor than an uncertain one to the heir, when the construction of the deed of gift admitted of the alternative. Hence arose the rule in Shelley's Case, as it is termed, that when a freehold is given to one, and by the same gift a limitation is made to his heirs, the inheritance vests in him and not in his heirs.

The rule may be also thus conversely summarized: heirs take by descent, and not by purchase, when they claim under an instrument in which their ancestors took either expressly or impliedly an estate of freehold of like quality with their own (See *Shapland v. Smith*),³ as to the question whether both estates are of the same quality. The rule will apply in courts of law, even though one of the legal limitations be subject to a trust.⁴ Fearne's opinion⁵ to the contrary is manifestly unsound, as his editor points out.

If the ancestor does not assign the land, it descends

¹ 1 Co. 91.

² Fearne on Contingent Remainders, 29.

³ 1 B. C. C. 74.

⁴ Pres. Es. 311.

⁵ Fearne on Con. Rem. 35.

to his heirs, yet an estate limited to them directly or by purchase, as it is termed, would be more valuable to them than one by descent, inasmuch as an estate of the former description does not lapse by the death of their ancestor in the testator's life-time,¹ and is not subject to his grants, charges, or debts, or the dower or curtesy of his or her consort.

The heirs in both cases alike, however, make title through their ancestor. Hence, an estate to trustees in trust for A., remainder to the heirs of A.'s body, gives to A.'s issue what is termed a *quasi entail*,² although the phrase is more usually found applied to equitable limitations of personalty in tail; or, rather, this latter class of *quasi* entails is the more common species.

A devise to A. and B., husband and wife, for their lives, with remainder to the heirs of their bodies, constitutes them tenants in tail by entireties, to bar which estate both A. and B. should concur. If A. and B. are persons who may lawfully intermarry, but are not actually married, they will be joint tenants in tail, and the survivor will have the *jus accrescendi*, if the deceased joint tenant have not barred his own entail. If A. and B. are two males, or are incapable of legal intermarriage with one another, they are joint tenants for life, with several inheritances in tail.³

The rule in Shelley's Case applies to wills, but its operation may be neutralized by the context, especially in America. The rule is here regarded only as a mere presumptive rule of construction that deserves little favor.⁴ Like the legal presumption in favor of a joint tenancy, it will be acted upon in those States where it

¹ Hutton v. Simpson, 2 Vern. 722.

² Mandeville's Case, Co. Litt. 26 b.; Fearne, Con. Rem. 80.

³ See Watkins on Conveyancing, chapter Estates Tail; 2 Jarm. 197-8.

⁴ Smith v. Hastings, 29 Vt. 240; Blake v. Stone, 27 Vt. 475.

has not been yet abolished by statute or construction, if the context of the will is silent to the contrary; but, even in those States where it is still recognized as an active rule of law, its force will usually be outweighed by the most trivial expression in the will to the contrary.¹ In some cases, no doubt, the English rules are recognized to their full extent.² But the later decisions lean to an abrogation of the rule.

Devises of advowsons or manors and shares in certain companies are, in respect to the rule in question, construed as if they related to land. A devise in tail of unentailable land or of chattels,³ gives a fee conditional, as at common law. Upon birth of issue the ancestor acquires a fee.

The rule in Shelley's Case applies to personalty as well as realty, if the context is not adverse.⁴ But a less emphatic context will preclude the application of the rule in respect to personalty than is necessary, if the entail relates to freehold land.⁵ It is not unusual to find the courts applying different principles of construction to the same limitations of land and chattels. In *Herrick v. Franklin*,⁶ Giffard, V. C., said he would apply those diverse principles to realty and personalty respectively, even though both descriptions of property were thrown into a common or mixed fund by the testator.

A will and codicil, or different codicils, are all one instrument, within the meaning of the rule in Shelley's Case, just as an appointment under a power, and the deed

¹ *Chelton v. Henderson*, 9 Gill, 432.

² *Dott v. Cunninghton*, 1 Bay, 453; *Goodrich v. Lambert*, 10 Conn. 448; *Evarts v. Chittenden*, 2 Day, 338.

³ *Stafford v. Buckley*, 2 Ves. Sen. 130.

⁴ *Ex'rs of Moffat v. Strong*, 10 Johns. 12; *Ellis v. Merrimack Bridge*, 2 Pick. 243.

⁵ *Forth v. Chapman*, 1 P. Wms. 663.

⁶ *Law Rep. 6 Eq. 593*; *contra*, *Dunk v. Fenner*, 2 Russ. & My. 557.

creating the power, constitute but one instrument in law, in respect to the same rule.¹ Butler², Preston,³ and Jarman, vol. II, 181,⁴ consider that an appointment does not bear a sufficiently intimate relation to the deed creating the power to admit of the operation of the rule in Shelley's Case on both instruments conjointly. But Fearne's⁵ opinion to the contrary appears to be much more solid. For appointments are, to all intents, mere uses, having a seisin only under the primary deed. So far as the doctrines of tenure, therefore, as distinguished from gifts, contracts, sales, and the rule against perpetuity, are concerned, all uses executed by the statute, and by analogy all equitable trusts, must be construed by the light of the common law. At common law the seisin of the particular tenant preserved contingent remainders. Why should not the seisin to feoffees or grantees to uses preserve, and conversely be subject to all the requirements of contingent uses, whether raised under a power or by the fulfilment of any other legal contingency?

The rule applies where the term children, issue, sons, &c., is construed to mean heirs of the body, and, conversely, does not apply where the phrase "heirs of the body" is interpreted to denote children or others as purchasers.⁶

The rule received one of its greatest perversions in the celebrated case of *Perrin v. Blake*,⁷ where it was held that the rule applied even though the donee for life was expressly prohibited from aliening the estate for a period

¹ *Hays d. Foorde v. Foorde*, 2 W. Blackst. 698.

² Co. Lit. 299, b.

³ 1859, Amer. Ed.

⁶ See *Albee v. Carpenter*, 12 Cush. 382.

⁷ 4 Burr. 2579; 1 W. Blackst. 672.

³ Est. 324.

⁶ Con. Rem. 75.

longer than his life. The English courts, however, are still disposed to maintain the rule in the full spirit of the decision in *Perrin v. Blake*.¹

In America a wholly different construction is adopted. The slightest intimation to the contrary in the will usually prevents the rule from being acted on by our courts in those States where it is still recognized,² while it is expressly abolished in others.

The phrase "heirs of the body" will be one of limitation, even though there be superadded a limitation to the heirs general of the heir of the body. But if the superadded limitation change the course of descent—if, for instance, the limitation be to the heirs female of the heir of the body—then the latter takes by purchase.³

But the rule in Shelley's case will prevail in England in despite of such phrases as "share and share alike," as "tenants in common," or "whether sons or daughters," or "without regard to seniority of age or priority of birth," &c. The law on these points is not yet settled in some of the United States,² but the tendency of the courts is to reject the application of the rule in all such cases. Indeed, is safe to say that the rule will not be applied if there is even less emphatic language in the will than the phrases just mentioned. These phrases leave no ground to doubt that the testator intended that the heirs should take by purchase. When they take by descent, the phrases referred to are put to silence, contrary to the general rule of construction that every word in a will is, if possible, to get some force and application.⁴ When land is devised to A. for life, remainder to his heirs, or to the

¹ *Nash v. Nash*, 3 Barn. & Ald. 839.

² *Findlay v. Riddle*, 3 Binn. 139; *Swain v. Roscoe*, 3 Ired. 200,

³ *Shelley's case*, 1 Reps. 91.

⁴ *Supra*, page 33.

heirs of his body, as tenants in common, they cannot possibly take in common if the ancestor takes the whole interest. Yet, strange to say, the rule is still enforced in England in such cases, and Fearne's opinion is in favor of such a construction.¹

Jarman² says of the rule that it "is a rule of tenure, which is not only independent of but generally operates to subvert the intention." Is not this an admission that the rule has been allowed to eliminate a broad area of testamentary discretion, and to subject wills, so far, to the cast-iron shackles of feudal interpretation? But no matter what the rule is, it is its application, and not its own nature, that is in question. Jarman, therefore, is arguing on this point without regard to the real issue.

The operation of the rule is not precluded in England by an estate to trustees to preserve contingent remainders,³ nor by a power to jointure conferred on a tenant for life, which implies that he has not the fee;⁴ nor by the clause "without impeachment of waste,"⁵ or "separate use;"⁶ (though this case, indeed, is not a direct authority on the point;) nor by a declaration that the freehold devisee shall have no power to defeat the testator's intent;⁷ or that the heirs shall take as purchasers.⁸ In *Douglas v. Congreve*,⁹ even a declaration that the limitations were in strict settlement did not prevent the application of the rule. It is morally certain that none of these cases would be followed at the present day

¹ Con. Rem. 80 *et seq.*

² Vol. II, 182.

³ *Coulson v. Coulson*, 2 Stra. 1125.

⁴ *King v. Melling*, 2 Lev. 58.

⁵ *Papillon v. Voice*, 2 P. W. 471.

⁶ *Lady Jones v. Lord Say & Sele*, 8 Vin. Ab. 262, pl. 19.

⁷ *Roe d. Thong v. Bedford*, 4 Mau. & Sel. 362.

⁸ Harg. Law Tracts, 561; 2 Jarm. 183.

⁹ 1 Beav. 59.

in America, but the heirs would be held to take by purchase.

The rule is applied in England more rigorously under wills than its laxity in some respects—even in respect to limitations in deeds—would warrant. For it does not apply where the heir is the joint heir of the freeholder and another.¹ If one person cannot be heir to both as testator intended, then the freeholder takes an undivided entail, and the son of the other takes by purchase. This contingent remainder will of course fail if the particular estate fail previously.

The rule applies to equitable as well as to legal estates. *Bagshaw v. Spencer*,² which decides the contrary, is not law now. But the rule does not apply to trusts executory. For instance, when the testator directs the trustees to buy and settle land or devises land to them, to be afterwards conveyed by them in a more special manner to a person and the heirs of his body, such executory trusts will, as a rule, be construed as if they were contained in marriage articles as distinguished from settlements.³

The case of *Austen v. Taylor*⁴ has been overruled, if, indeed, it ever was an authority for the doctrine that a direction to trustees to buy and settle land differed in its legal effect from a mere direction to buy, the uses being finally declared by the testator. In principle, these two classes of cases are certainly distinguishable. The former are executory trusts; the latter are trusts executed, as regards the limitation of estates, to the

¹ *Gossage v. Taylor*, Sty. 325; see *Lane v. Pannell*, 1 Roll. Rep. 238, 317, 438.

² 1 Ves. Sen. 148.

³ *Leonard v. Earl of Sussex*, 2 Vern. 525; *Lord Glenorchy v. Bosville*, *Cas temp. Talb.* 3.

⁴ Amb. 376.

devisees. However, the law in such cases is now settled, and, happily, contrary to the adoption of the rule in Shelley's case.¹

Jarman² thinks that, in these cases, indeed, the words used by the testators, even if standing alone, without any limitation to trustees, would not admit of the operation of the rule. But the case of *Meure v. Meure*³ is much stronger than that, although it must be admitted that its principle is infirm in law though sound in sense. For the rule in Shelley's case has been applied in several cases where there were no trustees, but in which the limitations were exactly analogous to those in *Meure v. Meure*. This case, however, is, on the other hand, hardly distinguishable from *Seale v. Seale*.⁴

In *Bastard v. Proby*,⁵ the direction to the trustees to settle the lands on the heirs of the body "as counsel should advise" was held to preclude the application of the rule. But in *Marshall v. Bousfield*,⁶ under a direction that the land "should be settled by able counsel," it was held that the rule applied. The only inference, nevertheless, to be drawn from these cases, as well as from *Meure v. Meure* or *Jervoise v. Duke of Northumberland*,⁷ is that less emphasis on the part of the testator will preclude the application of the rule in Shelley's case where there is a direction to trustees to buy or to convey than where there is no reference to trustees. The rule, of course, is more freely applied to executory trusts under wills than if the

¹ *Meure v. Meure*, 2 Atk. 265.

² Vol. II, 191.

³ 2 Atk. 265.

⁴ Pre. Ch. 421; s. c. 1 P. W. 290, and *Blackburn v. Staples*, 2 Ves. & Bea. 367.

⁵ 2 Cox, 6.

⁶ 2 Madd. 166.

⁷ 1 Jac. & W. 559.

limitations in question were contained in marriage articles.¹ Cases, therefore, arising under marriage articles are not strictly in point. Even the case of *Seale v. Seale*,² shows that the rule will be applied if the direction is merely to convey to A. and his heirs, or to A. and the heirs of his body.

The same principles of construction, indeed, apply to marriage articles as to articles of any kind and to executory trusts in wills. But, as the intention of a settlor by articles is obvious, this intention is always carried out, and the unborn issue get estates by purchase. Under wills, the courts have not the same clue to the testator's intention on this point. Therefore, no general rule of construction can exist for construing words of limitation in executory trusts under wills in the same manner as if the clause was in marriage articles.

If there be a direction to trustees to settle lands on A., or if the devise be to A. for life, and after his death to the heirs of his body, Jarman³ inclines to a strict settlement. The case of *Bastard v. Proby*, however, is no very conclusive authority on the effect of a declaration of this kind without any additional clause showing that the testator plainly intended that the first freeholder should only have an estate for life. Jarman's opinion, however, on the whole, is more likely to be followed, even in England, on any new case, than the ruling in *Blackburn v. Staples*.⁴ That case, indeed, appears to be rightly decided since the limitation to the unborn issue was to him when he attained 24, and was therefore void for remoteness, and could only be executed *cy pres* in the ancestor. Sir William Grant, however, did not rest

¹ See *Rochford v. Fitzmaurice*, 1 Con. & Laws, 158.

² Pre. Ch. 421, s. c. 1 P. Wms. 290.

³ Vol. II, 194.

⁴ 2 Ves. & Bea. 367.

his decision upon this point, but on the time-honored authority of the rule in Shelley's case. See *Blackburn v. Staples*, *ut supra*.

In *Platt v. Powles*,¹ the devise was to the testator's widow for life, and after her decease to the heirs of her body by the testator. On the death of the testator she became tenant in tail after possibility of issue extinct. *Jarman*² considers that for nine months after testator's death she could have acquired the fee by a recovery. But this opinion is surely unwarranted. The law regards possibilities only where there is no evidence to the contrary. A non-existing event, when examined after its proper date, is an impossibility. The widow's right, therefore, to acquire the fee appears to be contingent on her having issue in the sense that her fee would be more than defeasible on the event which happened, for it would then be proved to have been void from the beginning.

The rule in *Wild's case*³ operates sometimes as an exception to the rule in Shelley's case.⁴ The rule in *Wild's case* is acted on in America. That rule provides that, in case of a devise to A. and his children, A. will take an estate tail if he has no children when the will comes into operation. But if he has, the children will take concurrently with the parent.⁵ If the period of vesting is deferred, all children born before that date will take jointly with their parent.⁶ An estate tail in personalty, it is to be remembered, means the whole estate. The rule in *Wild's case* applies to both realty and personalty.⁷

¹ 2 Mau. & Sel. 1, § 65.

² Vol. II, 186.

³ 6 Co. 17.

⁴ 6 Rep. 17.

⁵ *Mason v. Clarke*, 17 B. 130.

⁶ *Cunningham v. Murray*, 1 De G. & Sm. 366; see *Read v. Snell*, 1 Coll. 86.

⁷ See *Audsley v. Horn*, 1 De G. F. & J. 226.

The rule in Shelley's case was received here as part of the common law. It still prevails in North¹ and South Carolina,² Tennessee,³ Virginia,⁴ Maryland,⁵ Pennsylvania⁶ and Ohio.⁷

The rule has been abrogated by statute in Connecticut, Massachusetts,⁸ New Jersey,⁹ New York and Michigan.¹⁰

In New York the Revised Statutes¹¹ constitute the heir a purchaser. Therefore, under a devise to A. for life, remainder to his heirs, alienation in fee is restrained during the life of A. and the minority (if any) of his heirs. These are the stock from which descent must be afterwards traced. A similar law prevails in New Hampshire.¹² In that State the rule in Shelley's case was in full force down to 1843.

The decisions in New York show, beyond any doubt, that the rule in Shelley's case has been abolished in that State.¹³ This, however, is a remedy just as bad as the disease.¹⁴ The natural function of the rule is that allowed it by the American courts of those States where legislation is silent on the matter. They suffer it to operate

¹ *Payne v. Sale*, 3 Battle, 455.

² *Carr v. Porter*, 1 McC. Ch. 60.

³ *Polk v. Faris*, 9 Yerg. 209.

⁴ *Roy v. Garnet*, 2 Wash. 9.

⁵ *Lyles v. Digge*, 6 Har. & J. 364.

⁶ *Findlay v. Riddle*, 3 Binn. 139; *Guthrie's Appeal*, 37 Penn. St. 9, 21.

⁷ *McFeely v. Moore*, 5 Ohio, 465.

⁸ *Steel v. Cook*, 1 Met. 282; Rev. Stat. c. 59, § 9.

⁹ New Jersey Rev. Law, 774.

¹⁰ Rev. Stat. Vol. I, 725, § 28.

¹¹ Vol. I, 725, § 28.

¹² *Dermett v. Dermett*, 40 N. H. 498.

¹³ *Freeborn v. Wagner*, 41 (N. Y.), 27; *Warfield v. Crane*, Id. 448; *Sheridan v. House*, Id. 569.

¹⁴ See *Brant v. Gelston*, 2 Johns. cas. 384; 1 Rev. Stat. 725.

where the context contains nothing to the contrary. It is likely that in those States the rule would not be applied where it is not the word heirs or heir that is used, but "son," "child," "family," "issue," or some other word of purchase. Issue, indeed, in England is considered to be, of its own nature, a word of limitation in wills. It certainly is less of purchase than the terms "son," "child," or "family," and therefore less efficiently resists the rule in Shelley's case.

The rule in Shelley's case is in force in Delaware. But, it is only regarded by the courts there as a rule of construction and intention. In Vermont there is a statutory system of conveyance. The rules of the common law, therefore, are by analogy to be considered as so far excluded in the construction of wills. In other words, the genius of construction should follow the statutory system of conveyance, and should only regard the use of technical phrases in wills as evidences of intent, and not possessing any cast-iron operation of their own. The reader is referred to a very able judgment by Judge Redfield, in 27 Vt. 475, and in *Smith v. Hastings*, 29 Vt. 240, where the learned author of the treatise on wills admirably suggests that the rule was founded on principles of feudal policy, which are obsolete and abrogated in America.

In Connecticut the rule was recognized to a certain extent until it was abrogated in 1821.¹ But, where there is no contest between ancestor and heir, the Connecticut courts incline to regard the devisee as taking in fee as against the heir of the testator.²

¹ 2 Redf. 339, 340.

² *Ingersoll v. Knowlton*, 15 Conn. 468. See *Cordey v. Adams*, 1 Harrington, 439; *Patterson v. Doe*, 7 Ind. 282; *Allen v. Hoyt*, 5 Met. 324; *Culbertson v. Daly*, 7 W. & S. 195; *Willis v. Rutchner*, 3 Wash. C. C. 369; *Stower v. Stower*, 9 S. & R. 434.

In Kentucky the clause "heirs of the body" is commonly a phrase of purchase.¹ In Pennsylvania the common interpretation is to regard the phrase as one of limitation.²

The rule in Shelley's case, however, prevails in Pennsylvania only to its natural extent. In other words, any clause to the contrary will neutralize it.³ As Chief-Justice Lewis very well observed in *Gernet v. Lynn*,⁴ "Neither the policy nor the words of the rule apply" where the word used is children, and there are two in existence to whom the devise relates. The case of *Williams v. Leech*⁵ treats the word children as equivalent to "heirs." But that decision is completely outweighed by a host of authorities, which show that the rule in Shelley's case will be applied in Pennsylvania—and we may add in any other State—only where the context says nothing whatever to the contrary.

The cases of *Nagle's Appeal*⁶ and *McKee v. McKinley*,⁷ indeed, incline towards the adoption of the rule in Shelley's case, with all its feudal strictness as exemplified in the case of *Perrin v. Blake*.⁸ But the current of authorities is clearly in the opposite direction,⁹ whither, also, tends every legislative provision on the point. It is safe to assert that no American court would, at the present day, apply the rule in any case where the context militated to the contrary.

Under a devise to one for life and after his death to his children, the children, being alive when the will

¹ *Prescott v. Prescott*, 10 Belton, 56; *Jarvis v. Quigley*, 10 Id. 104.

² *Guthrie's Appeal*, 37 Penn. St. 9.

³ *Findlay v. Biddle*, 3 Binn. 139.

⁴ 7 Casey, 94.

⁵ 4 Casey, 89.

⁶ 9 Casey, 89.

⁷ 9 Casey, 92.

⁸ 4 Burr. 2579.

⁹ See *Chew's Appeal*, 37 Penn. St. 23.

took effect, were held to take as purchasers.¹ It follows, from this and various cases decided in Pennsylvania, that the rule in Shelley's case, like most of the common law rules of England, will prevail only where there is no expression whatever of a contrary intent in the will.²

In *Sisson v. Seabury*,³ a devise to A. and his male children, "lawfully begotten of his body, and their heirs forever, to be equally divided among them and their heirs forever," was held to pass a life estate to A., with a contingent remainder in fee to his children. He had none when the will was made.

The operation of the rule in Shelley's case is not excluded as often as is desirable, even in the United States. Thus, in *Monroe v. Douglass*,⁴ the devise was to three brothers, equally to be divided among them, provided that, "in case of the death of one or more of them, his or their share or their part should descend to the heirs of his or their body, and in case of the death of either without lawful children, then that said remainder should be equally divided." It was held that the brothers took estates tail.

In *Daly v. James*⁵ the rule in Shelley's case was as strictly acted upon as the judges who decided *Perrin v. Blake* could desire. In *Daly v. James* the testator devised all his real property to his son, and the heirs of his son lawfully begotten, and in case of the death of his son without such heirs, he directed that his real estate should be sold and the proceeds divided among the brothers and sisters of the testator and their heirs, or such of them as should be living at the time of his

¹ *Gernet v. Lynn*, 31 Penn. St. 94.

² See *Schoonmaker v. Stockton*, 37 Penn. St. 461; also, 2 Redfield on Wills, 338.

³ 1st Circ. (R. I.) 1832, 1 Sumn. 235.

⁴ 5 N. Y. (1 Seld.) 447.

⁵ 8 Wheat. 495.

death. The brothers and sisters all died leaving issue. Afterwards the son died without issue. It was held that, the Court being divided upon the construction of the devise, as an original question, it would follow the decision of the Supreme Court of the State¹ that the word "heirs" is to be construed a word of limitation, and, consequently, that the devise to the brothers and sisters failed to take effect, as they died in the lifetime of the son. This decision does not appear to be very satisfactory; at all events, at the present day it is of doubtful authority. There was no reason why the word "heirs" should be mentioned in order to pass the produce of the sale, which was personalty, to the sisters. The ruling, therefore, was equivalent to striking the word heirs out of the will, not for the purpose of effectuating, but of defeating the bequest to the heirs of such sisters as might die in the son's lifetime.

*Osborne v. Shrieve*² is another American decision where the rule in Shelley's case was applied without apparent cause. A. devised land to his son S. and to his male heir (in the singular), and to his heirs and assigns forever; but, if it should be that S. should depart this life leaving no male heir lawfully begotten of his body as aforesaid," then to the testator's grandson O. in fee. It was held that S. took an estate tail, with remainder over to O. on the indefinite failure of the issue of S. This was *Archer's case*,³ almost in so many words; nor was there room to contend that S. even took an estate tail in remainder after the remainder to his heir (by purchase), since the words "as aforesaid" precluded this construction. Yet, the heir of S., it was held, could not take by purchase, but that S. took an estate tail.

¹ 1 Binn, 546.

² 3 Mas. 391.

³ 1 Co. 66.

In *Smith v. Bell*,¹ the Supreme Court of the United States held that where personalty was given to testator's wife "absolutely," remainder after her decease to testator's son, the widow took only a life estate. The English courts would formerly have held the will void for uncertainty. At present they would doubtless act on the rule in *Smith v. Bell*. It is melancholy to find so many cases where a testator's directions in behalf of his issue have been, even as regards personalty, annulled by reasoning formed on analogies to the rule in *Shelley's* case. In many other cases the limitations have been, with equal imprudence, held to be repugnant to the context.

The operation of the rule has not, latterly, been sought to be extended even in England.² In *Herrick v. Franklin*, Giffard, N. C., denied the case of *Dark v. Fener*³ to be law now. At the same time, there is no ground for hoping that, in the absence of legislative interposition, courts in the United Kingdom will adopt the American principles of construing the rule.

¹ 6 Pet. 68.

² See *Herrick v. Franklin*, Law Rep. 6 Eq. 593; *Halloway v. Halloway*, Id. 523.

³ 2 Russ & My. 557; see *Dott v. Cunningham*, 1 Bay, 453; *qu. contra* *Swain v. Roscoe*, 3 Ired. 200.

CHAPTER VII.

ESTATES TAIL.

§ 1. *Their nature and incidents.*

The greatest defect in the law of England and of some of the United States, is the existence of estates tail. These interests, as a rule, are not devisable unless they have been previously disentailed; nor are they subject to any charge or conveyance that does not operate so far as a disentailing assurance.

An estate tail differs from an estate in fee in descending only to the particular heirs indicated. Thus, a devise to A., and the heirs female of his body, escheats if there be no such heir. A female collateral heir, not a descendant of A., will not inherit as she would if the devise was to A. and his heirs. So a devise to A. and the heirs male of his body, begotten by his wife B., will not descend to a son of A. by C., a subsequent wife. *A fortiori*, the entail will not descend to a daughter or a distant relation of A. as an estate in fee simple would.

Besides this peculiarity of descent from the first donee in tail, estates tail are subject to other special incidents. Although subject to dower and curtesy, they are not alienable except by fine or recovery. A fine bars the issue. A fine and recovery, or a recovery alone, will bar both the issue and remainder-men. An ordinary conveyance of the land is voidable by the issue. But, a deed of grant of rent charge or of any interest against "common right" is absolutely void on the grantor's death. If, however, he disentail the land, this lets in his charges; *aliter*, if the issue disentails.

Conveyances, leases, charges and incumbrances by tenants in tail are distinguishable into three classes, viz.: 1, those which are absolutely valid and indefeasible by the issue in tail; 2, those which may be avoided by him; and, 3, those which are absolutely void on the death of the tenant in tail, and are incapable of confirmation by the issue. To the first class belong fines, recoveries, all charges secured thereby, and leases or debts confirmed by statute. The second class comprises all conveyances of the land except by fine or recovery. The third class consists of grants of incorporeal rights and judgments.¹

If a tenant in tail first execute a rent charge or confess a judgment, and then settle the property by a voidable deed, the charges will endure until the deed is avoided by the issue. But if the tenant in tail settle the land by merely creating a term to certain uses, it is doubtful whether the issue in tail, if he takes an estate under the term cannot set it up, and yet avoid the rent charge and judgment, while, if the settlement were in fee, he would be at once remitted, taking a legal estate, and thus the settlement itself would be annulled.²

In a deed an entail can only be created by the words "heirs of the body," "heirs of the blood," "heirs of the flesh," &c. Words of inheritance and of procreation are both necessary. The estate likewise of the donor must be one of inheritance, and not an estate *par autre vie* or a term of years. This latter rule applies also to the creation of estates tail by will. A tenant *par autre vie* cannot create a greater estate than he himself owns. Therefore, such estates admit only of *quasi* entails. These may be barred by deed surrender or arti-

¹ See Co. Litt. Titles "Confirmation," "Estates Tail."

² See 1 Dyer, 51, a, note.

cles, but not by will. But the rule that requires words of inheritance for the creation of an estate tail by deed only apply in a will so far that the language used must be capable of implying a limitation equivalent to an estate tail in a deed. Any gift by will, therefor, that will confine the descent to the issue of the donee, will constitute an estate tail special or general, male or female, according to the directions, and may also imply cross-remainders.¹ Words of procreation will often be supplied in a will. Thus a devise to A. and his heirs male for ever, or to A. and his heirs males living to attain the age of twenty-one,² gives A. an estate in tail male.

A tenant in tail may commit unlimited waste of every kind, and cannot be restrained by condition from aliening by fine or recovery. As the estate is one of inheritance, it is liable to dower and curtesy, but not to debts after the death of the debtor, except so far as a local statute provides to the contrary.

A devise to A. and the heirs of his body, or to A. for life and after his death to the heirs of his body, vests an estate tail in A. So under a gift to A. and his issue or to A., and if he die without issue then over, A. takes an estate tail in realty, and the absolute interest in personalty in England and in those States where a restricted meaning of the word issue does not obtain.

The word "heirs," if used as synonymous with "issue," means "heirs of the body."³ Even in a deed a gift to heirs in the premises may be cut down in the habendum to "heirs of the body," although the habendum, as a rule, cannot abridge an estate given in the premises. The distinction is that the habendum may

¹ *Green v. Stevens*, 12 Ves. 419; *Doe d. Tremewan v. Permewan*, 3 Per. & D. 320.

² *Albec v. Carpenter*, 12 Cush. 382; *Appleton v. Rowley*, L. R. 8 Eq. 139.

³ *Albec v. Carpenter*, 12 Cush. 382.

explain the premises and "heirs of the body" are still "heirs."

Under a devise to A. and his heirs, and, if he die without issue, then to B., A. takes only an estate tail,¹ if there is no local statute on the point. So a devise to A. and his heirs, or heir or next heir,² or to A. simply, and, if he die without issue,³ remainder to B., gives A. an estate tail. But, if the devise be to the heir male of A.'s body with remainder to his heirs, the issue of A. takes an estate tail, according to the early cases.⁴ The superadded words varying the descent served to show that the heir and not A. was the stock of the entail. Mr. Hawkins,⁵ however, considers that words of limitation have now no more effect than words of distribution in excluding the rule. This opinion is probably right so far as the English cases are concerned. A devise to A. and his children, he having none at that time, gives A. an estate tail.⁶ A devise to B., if A. have no heirs, gives A. an estate tail if B. is a relative of A., for, otherwise, the limitation would be unmeaning. But if A. is a stranger, or a person who cannot be heir to B., the devise is void for remoteness.⁷ Under a devise to A., and if he die without heir or issue, the estate to go to B., his brother, gives an estate tail to A. by implication.⁸

Under a devise by testator to his wife for life, and after her decease to her two daughters, A. and B., to them, their heirs and assigns; but, in case they should die without issue, that the same should go to and vest

¹ *Hansell v. Hubbell*, 24 Penn. St. 244.

² *Cuffee v. Milk*, 10 Met. 366.

³ *Hawley v. Northampton*, 8 Mass. 3.

⁴ *Archer's Case*, 1 Co. 66.

⁵ P. 186.

⁶ *Nightingale v. Burrell*, 15 Pick. 104, 114.

⁷ *Griffiths v. Grieve*, 1 Jac. & W. 31.

⁸ 3d Circ. Pa. 1818; *Willis v. Bucher*, 3 Wash. C. Ct. 369.

in their two sisters, C. and D., it was held¹ that the devise to A. and B. was a fee tail and not a fee simple, the contingency upon which the limitation was to take effect not being limited to a life in being, but upon an indefinite failure of issue. It was also held that the estate given to C. and D. was a vested remainder, to take effect upon the death of both A. and B. without issue; that cross remainders in tail were to be implied between A. and B.; that at common law A. and B. would take a joint estate for life with several remainders in tail to their issue; but that, by the Statute of Rhode Island, it was turned into a tenancy in common, and that several estates tail vested in them.

In *Murdock v. Shackleford* the devise was as follows: "I lend to my son, W., the tract of land whereon I live during my life, and, if he has children at his death, he may dispose of it as he thinks proper, reserving to his now wife the use of the land for her life, as long as she remains his widow; but, if she marry, then she is to have only one-third part. If my son, W., dies without heirs of his body, then the land, with the consideration above-mentioned, to go to my son, Z., &c. It was held that W. took an executory devise in tail after an estate for life to himself, with remainder in fee to his children living at the time of his death, which executory devise in tail was to take effect on the contingency of his dying without children living at the time of his death. W. appears to have taken a remainder in detail, and not an executory devise in tail after his life estate; since, if land be limited to two for their lives, with remainder to the heirs of him who dies first, the remainder, nevertheless, vests in the ancestor who dies

¹ *Lillibridge v. Adie*, 1 Mass. 224, 1 Circ. R. I. 1816.

• ² 4th Circ. Va. 1808, 1 Brock Marsh, 131; see *Wright v. Scott*, 4 Wash. C. Ct. 16.

first. W.'s estate is capable of being considered as a remainder. It therefore comes under the rule which forbids a contingent remainder to be ever construed as an executory devise.

§ 2. *No merger of estates tail.*

A remainder in fee is very common after a limitation in tail to the same person or to his sons. The estate tail does not merge in this remainder, unless it is changed by a fine into a base fee. It will then merge in the remainder when it descends, and the tenant will be in by descent and not by purchase. He will thus be liable for his ancestor's debts. Accordingly, wherever a tenant in tail can command the consent of the immediate feeholder, or has that feehold himself, he always suffers a recovery, which creates not a base fee, as a fine does, but a fee simple, incapable of merging in the remainder in fee, which it destroys. A remainder in fee may be created in a will as in a deed, after a limitation in tail. The estate tail in such a context will not be expanded into a fee, but left as an entail, with a remainder in fee. As a fee simple may, by implication, be cut down to a fee tail, so an entail general may, by the context, be cut down to mean an estate in tail special. Entails by implication are very frequent in wills, where there is a reference to a devisee's death without issue. The incidents of an estate tail are, of course, the same whether the estate is created by express words or arises by implication.

When a tenant tail has (which is usually the case), the reversion alone in fee by descent, he should never levy a fine. The effect of a fine is different from that of a recovery, inasmuch as it does not bar the remainder, but merely converts the entail into a base fee. This

estate in the case put would merge at once in the reversion in fee. The tenant in tail would then be tenant in fee by descent and not by purchase. He would, consequently, be liable for his ancestor's charges and debts, though if he had suffered a recovery its effect would be to expand the entail into a fee simple, and so shut out the reversionary fee by descent. He would thus be tenant in fee by purchase, and hold the land free and clear of all manner of incumbrances, except those created by himself.

A fine, however, is often alone available to a tenant in tail in remainder, if the particular tenant will not consent to the disentailing of the land. A fine is also convenient, as it can be levied at any time of the year, and not, like a recovery, merely in term. Besides, it is less expensive, and when levied with proclamations, gives a title by non-claim. It operates thus as a special statute of limitations in favor of tenants in tail. Yet, all these advantages are completely outweighed by the fact that if the tenant in tail owns the reversion in fee, he changes by a fine his estate from one by purchase to one by descent.¹

Redfield² lays down the doctrine that a remainder after an estate tail is void, as being too remote and founded on an indefinite failure of issue. No remainder, however, after an estate tail is void for remoteness, but, if limited after the indefinite failure of issue of one who takes no estate tail, then the limitation is void. If it is limited not immediately after the estate tail or in defeasance of it, but at a period, say a year or a month, after the termination of the estate tail, it is also void,

¹ See Burton's Compendium, title "Estates tail," Co. Litt. titles, "Estates tail," "Confirmation," "Charge," "Recovery." Shelford's Real Prop. Statutes.

² Vol. II, 216, § 3, 2d ed.

because, though executory, it is not limited so as necessarily to vest during a life or lives in being and twenty-one years afterwards.

The reason why a limitation by way of remainder after an estate tail, or as an executory interest defeating such an estate, cannot be too remote, is drawn from the fact that the tenant in tail can at any time bar such ulterior interest. If he die without barring it, then if it is a remainder, unless it vests at farthest upon the death of the tenant in tail, it is defeated and ceases to tie up the inheritance. If it is an executory interest, however, it may be void for remoteness, even though limited after an estate tail, although this position is denied by some writers of authority.

Executory interests, as they alone come within the reason of the rule against perpetuities, so are they unaffected by the incidents of remainders. These, as will be shown in a subsequent part of this work,¹ cannot be too remote, whether limited after estates in tail or for life. But, executory interests rest on a wholly different foundation. For instance, under a devise to A. in tail, remainder forty years afterwards to the heirs of B., here, if this executory interest to B.'s heir were valid, the inheritance might be in abeyance for forty years. It is clear such executory interest is void for remoteness. But if it were to abridge or defeat the estate tail, it could not be too remote.

The statement in Kent,² therefore, that a limitation after an estate tail is void by way of executory devise, as being too remote, is only true with the qualification mentioned. In other words, certain, but not all executory devises after estates tail are void. If the limitation

¹ See *infra*, ch. 26 on "Void testamentary gifts."

² 4 Comm. 276.

is a remainder, or even a shifting use, it is valid. But if it is a springing use, it is void.

§ 3. *American modifications of the law of entails.*

Estates tail were introduced into our law with the other elements of English jurisprudence.¹ But, being inconsistent with the more radical principles of a Republic, estates tail are now obsolete in some States, and are greatly modified in most others. Where they do exist in their primary force, they can only be barred by fine or recovery.

Although they still prevail in Massachusetts, Delaware, Pennsylvania and Maine, they may in all of these States be barred by ordinary deed and in some by will. In Massachusetts estates tail descend as in England,² and in some of the States where they still exist they may be barred by will and attached by creditors.³

Estates tail are abolished in Virginia, New Jersey, New York, North Carolina, Kentucky, Tennessee and Georgia. They are unknown to the laws of South Carolina and Louisiana. In New Hampshire a tenant in tail may convey by ordinary deed. In Alabama and Mississippi a conveyance may be made to a succession of donees, and to the heirs of the remainder-man. In Connecticut, Missouri, Ohio, Illinois, New Jersey and Vermont, the first donee in tail takes a life estate and a fee simple vests in his heirs or in the first remainder-man. A tenant in tail in these States has virtually only an estate for life, as he cannot encumber the inheritance.⁴

¹ 4th Kent, 5 ed. 14, 15.

² *Wight v. Thayer*, 1 Gray, 286.

³ *Danes Abr.* vol. 4, p. 621; *Purdon's, Dig.* 353.

⁴ See *Den v. Small*, 1 Spencer, 151; *Saunders v. Hyatt*, 1 Hawks, 247; *Tinsley v. Jones*, 13 Grat. 289; *Bramble v. Phillips*, 4 Leigh, 90; *Thom-*

In Indiana a tenant in tail is deemed to be seized in fee after the second generation.

In Connecticut there may be a tenancy in special tail.

In Rhode Island estates tail may be created by deed, but not by will longer than to children of the devisee, and they may be barred by deed or will.

In some other States almost all the common law distinctions between estates in fee simple and in tail are abolished, and both kinds of limitation are held to be virtually in fee simple.¹

In Maryland estates tail general are virtually abolished, being devisable and chargeable with debts. But estates tail special in that State cannot be devised or charged with other than mortgage debts.²

In the other States where estates tail are abolished by statute, a limitation in fee tail is equivalent to one in fee simple.³

ason v. Andersons, 4 Leigh, 118; Ross v. Toms, 4 Dev. 376; Doe v. Craiger, 8 Leigh, 449. For Connecticut, see Hamilton v. Hemstead, 3 Day, 332; Allyn v. Mather, 9 Conn. 114. For Vermont, see Giddings v. Smith, 15 Vermont, 344.

¹ See Johnson v. Johnson, 2 Met. (Ky.) 331.

² See Newton v. Griffith, 1 Harris & Gill, 111.

³ Bramble v. Billups, 4 Leigh, 90.

CHAPTER VIII.

DYING WITHOUT ISSUE.

Whatever liberality of construction is allowed in the case of a deed, the same and much more is conceded in the case of a will. Now, even in a deed the *habendum* is allowed to explain the premises, and thus indirectly often to abridge the quantity of interest passed by the premises. For instance, a grant to A. and his heirs, *habendum* to him and the heirs of his body, will give A. only an estate tail, although he takes a fee by the premises. But, if the grant were to A. and his heirs, *habendum* to him for life, the *habendum* would be void. For, of two totally repugnant clauses in a deed, the first will prevail. The reverse rule is adopted in the case of wills. It is rarely, however, that even a will contains two passages that are strictly contradictory of one another, though wills doubtless often enough abound in sentences that are more or less incongruous.

By analogy to the limitation to A. and his heirs, and if he die without heirs of his body, over, a devise to A. and his heirs, and if he die without issue over, gives A. an estate tail. For "issue" in a will is equivalent to "heirs of the body" in a deed; and, as this clause may cut down a fee in instruments of the latter class, *a fortiori*, it may have the same effect in wills.

In the case put there is no difficulty. But let us suppose that the devise is to A., and if B. dies without issue, remainder to C. in fee. Here the operation of the phrase "dying without issue," would have the effect of rendering the devise to C. void for remoteness. In other words, the phrase "dying without issue" means

dying and leaving no issue at some time or other, and not merely at the time of death of the *propositus*. As such an indefinite failure of issue might not happen within a life or lives in being, and twenty-one years after, the remainder to C. is void for remoteness. But, if the limitation were to A. and his heirs, and if he die without issue, remainder to C., this remainder would be good, inasmuch as it would be limited to take effect on the determination of an estate tail, and no remainder after an estate tail can be too remote, because the tenant in tail can always bar such ulterior interest.¹

This meaning of the phrase in question is much more easily got rid of in bequests of personalty, than where the devise relates to freehold. The phrase "*leaving no issue*," accordingly, has been decided to point to a failure of issue at the death of the *propositus*, in case the subject of the disposition be personalty; but, if the subject-matter is freehold, the phrase is construed to mean an indefinite failure, even though in the very same will it be construed, as already stated, so far as it is used in disposing of personalty.* This actually happened in the case of *Forth v. Chapman*.² The phrase "*leaving no issue*" was construed in that case to denote an indefinite failure as regarded realty, and a failure at the time of death of the *propositus*, as regarded personalty. The very same point was decided in *Mayzcker v. Vanderhorst*.³ In that case the devise was of real and personal estate to the testator's daughter and "the heirs of her body forever," but, if she should "depart this life leaving no lawful heir or heirs of her body" then over. It was held that the limitation over pointed to an indef-

* See *Hallet v. Pope*, 3 Harr. 542; *Moore v. Howe*, 4 Mon.; *Downing v. Wherrin*, 19 N. H. 9.

² 1 P. Wms. 653.

³ 1 Bailey's Eq. 48.

inite failure of her issue as regarded the realty, but to a failure at the time of her death as regarded the personality.

As the general rule of construction is not carried out where the bequest is personality, provided the context at all favors a departure from it, so also the courts have engrafted another exception upon it, *viz.*, where the testator has no issue and uses the phrase "dying without issue" in reference to himself. This will then mean a failure of issue at his death, no matter whether the subject of the donation is real or personal.¹

A third class of exceptions to the general construction of the phrase "dying without issue" consists of those cases where the context of the will shows that the testator meant a failure at the time of death. This, indeed, is not so much an exception to the rule of construction referred to as a statement of the fact that a testator is bound by no rule of conveyancing not amounting to a rule of public policy. The reader of a treatise on wills, therefore, should remember that every rule and exception thereto which he is reading applies only if the testator has said nothing to the contrary. If he has, the will of the testator, and not the rule of law, will be followed. We refer, therefore, to the fact that the testator may preclude the statutory or common-law meaning of the phrase "dying without issue" merely that we may add that a failure of issue, at the time of death of the *propositus*, will always be more readily inferred if the subject of the gift be personality than if it be freehold.²

Where the gift over is to take effect expressly on the death of the first taker, there is no difficulty,³ no matter

¹ French v. Caddell, 3 B. P. C. (Toml. ed.) 257.

² Fearne on Cont. Rem. 471.

³ Doe d. King v. Frost, 3. B. and Ald. 546.

whether the *propositus* takes an express or an implied fee.¹ But, if he takes only an estate for life or an estate tail, the restricted construction will not be adopted.² The reason is because the issue of the *propositus* will be sought to be benefitted in the cases last put by giving the first taker an estate tail. This reference or presumption in favor of an estate tail, however, will be rebutted if the *propositus* gets by the will certain limited powers which he would not require if he was to be plenary tenant in tail.³

If the event of dying is confined within a certain age of the *propositus*, the failure of issue cannot be held to be indefinite. In such a case, as, for instance, under a devise to A. and his heirs, and if he die under twenty-one and without issue remainder to B., this remainder will take effect if A. has no issue living at the time of his death. A. does not take an estate tail, but a fee subject to an executory devise in favor of B.⁴ An estate tail in possession is thus always better than an estate in fee, if this is subject to an executory devise; because the tenant in tail can bar all remainders and executory devises after, or in defeasance of, his estate tail, whereas a tenant in fee cannot defeat any valid, ulterior limitation whatever.

As an estate tail always prevents a limitation after it from being too remote, because the tenant in tail can bar it, it was on this account that the courts interpreted a failure of issue to mean an indefinite failure as regarded land, because the remainder over was thus supported and prevented from being too remote, while, even if the tenant in tail defeated it, he then had a fee

¹ *Blinston v. Warburton*, 2 K. & J. 400.

² *Id. Ex parte Davies*, 2 Sim. N. S. 114.

³ *Doe v. Frost*, 3 B. & Ald. 546.

⁴ *Eastman v. Baker*, 1 Taunt. 174.

which would go to all his issue, as well as to his heirs general. In cases of personalty, however, there is no such thing as an estate tail. The person to whom an entail is limited in personalty takes the absolute interest,¹ and a remainder over is void. Hence the courts strained after confining the meaning of the phrase "dying without issue," and especially to denote a failure of issue at the death of the *propositus*, in case the subject of the donation was personalty.

The nature of the subject-matter, and the terms of the ulterior devise, sometimes show that a failure of issue at the time of the death of the *propositus* is what is intended. Thus, if the land is chargeable with moneys to be paid within a definite period after the decease of the first taker;² or, if the ulterior estate is for life only,³ the restricted construction will obtain.

Jarman⁴ thinks that, as an estate for life is often, in practice, limited after an estate tail, the fact that the ulterior interest is for life ought not to lead to an adoption of a restricted construction of the phrase "dying without issue." But this reasoning is hardly philosophical or practical; for, in the case of the limitation in question, the testator means that the first taker is to have only a life interest, unless he has issue. Life interests are often limited after estates tail, but not where the tenant in tail has actually in existence a large family at the time. Such a limitation over would be frivolous. Jarman then compares his merely abstract position with an actual limitation to a living person, after a gift for life to a person who, most probably, has no issue at all at the time of making the devise. Sir

¹ *Appleton v. Romley*, Law Rep. 8 Eq. 139.

² *Nichols v. Hooper*, 1 P. Wms. 98.

³ *Roe d. Sheers v. Jefferey*, 7 Durn. & East. 589.

⁴ Vol. II, 435.

W. Grant, however, would not adopt the restricted construction in a case where some only of the remainders over were for life.¹

Where the property, in the devise over, was charged with certain sums of money to be disposed of by the will of the first devisee, the restricted construction will obtain.²

Jarman³ very justly observes that, if the first taker gets only an express estate for life, the restricted construction ought not to be so readily applied as where he gets the fee, because in the latter case the issue may take by descent, whereas in the former they get nothing, and yet the remainder-man takes nothing until they fail. Besides, when the first taker has a fee limited to him, the ulterior tenant cannot be barred by a recovery, while the prior tenant has a fee which may become obsolete.

The phrase "dying without issue," in a devise of freehold land, is construed generally in the United States as it was in England⁴ prior to 1838.⁵ Consequently, in those States where there is no statutory provision on the point, the phrase is equivalent to dying without heirs of the body. In several of the States, however, as in England since the date mentioned, the failure of issue refers to the death of the ancestor. Even in those States where there is no statutory rule of construction on this head, the courts strain at some plea in the context for interpreting the phrase in its restricted sense, if this is necessary to support a limitation over. Thus, it has been held,

¹ Barlow v. Salter, 17 Ves. 479.

² Nichols v. Hooper, *ut supra*.

³ Vol. II, p. 440.

⁴ 1 Vict. c. 26, § 29.

⁵ 3d Circ. Pa. 1818, Willis v. Bucher, 3 Wash. C. Ct. 369.

that a devise, "if either of my sons A. and B. should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs," points to a failure of issue at the death of A. or B. A. and B. were held each to take a conditional fee, subject to an executory devise in favor of the survivor.¹

If the subsequent estates are for life only, this is some intimation that the testator did not contemplate an indefinite failure of issue.² Jarman, however, thinks the decision cited an "extraordinary one."³

The phrase, "leaving no issue," will be construed more readily than "dying without issue," in a restricted sense. Yet, "leaving no issue" will not be restricted in meaning as to realty in England, even though the lands be copyhold, in which there is no custom of entailing, and of which the ulterior limitation is, therefore, too remote. But, if the testator has no issue, and refers to himself leaving no issue, the failure referred to will be admitted to point to the time of his decease.⁴ So a devise to A. and his heirs, but if he die under twenty-one and without issue, then over gives A. a fee determinable on his death without issue. A like construction prevails in every case where the dying without issue is connected with some event personal to an individual.⁵

A gift over if the devisee dies under twenty-one, or under twenty-one and without issue, gives him the fee by implication if he attains age, even in those States

¹ 3 Abbott v. Essex Company, 2 Curt. C. C. 126; see Smith's Appeal, 23 Penn. St. 9.

² Roe v. Sheers v. Jeffery, 7 Durnf. & E. 589.

³ 2 Jarman. 435.

⁴ French v. Caddell, 3 B. P. C. Toml. ed. 257.

⁵ Griswold v. Greer, 18 Geo. 545; Armstrong v. Armstrong, 14 B. Mon. (Ky.) 333.

where a general devise does not mean a fee.¹ In these States, also, the devisee takes the fee if the legal estate is in trustees, and the purposes of the trust require that they should take the legal fee.

In *Doe v. Watson*² there was a devise to two grandchildren of the testator, provided that if both should die under age and without lawful issue, then over. It was held that, as the children attained age, the devise over never took effect.

Where a testator does not contemplate the event of any of his children dying under age, but directs the distribution of his estate to be made when the youngest child attains majority, the bequest may be deemed dependant on the majority of that child alone, and is not void as suspending the power of alienation for more than two lives.³

A devise of a reversion expectant on an estate tail should provide that the clause, dying without issue, should mean the issue inheritable under the entail, or else refer to that estate, otherwise the gift may be void for remoteness. The phrase, "dying without issue," by the 1st Vic. c. 26, s. 29, points to issue at the decease of the ancestor. The phrase in question, therefore, cannot in future in England, or in States having analogous statutes, give an estate tail by implication, except in the instances excepted in the section. This section will not abridge estates given previously to children, because the word issue will refer to the children, and, if occurring subsequently, will mean such issue according to the rule in *Malcolm v. Taylor*,⁴ while in other cases it will prevent the limitation over from being void for remoteness.

¹ *Burke v. Annis*, 11 Hare, 232.

² 8 How. 263.

³ *Burke v. Valentine*, 52 Barb. 412; s. c. 5 Abb. Pr. N. S. 164.

⁴ 2 Russ. & Myl. 416.

A limitation over after a general failure of issue is void as to personalty. Hence, the courts endeavour still more earnestly than in the case of realty to confine the reference to a failure of issue, to the time of the death of the first taker of personalty.

As regards such property, therefore, words denoting a failure of issue, following a bequest to children,¹ either for life in fee or in tail, refer to them and will not enlarge any of the prior estates. This construction will *a fortiori* apply where the previous bequest is to children, even though they be subjected to certain qualifications. Where the phrase is "in default of such issue," it obviously points to the preceding donees, whether children, sons, or daughters. This rule applies to devises as well as bequests, and even though the previous bequest be to child or daughter in the singular. The parent in such cases takes no estate tail.

Where there is a devise to issue of a particular kind, or subjected to certain restrictions, the clause, in default of issue (not "such issue"), will usually be held not to refer to the preceding issue, but to enlarge the ancestors' estate by implication to an estate tail in remainder.¹ Therefore, under a devise to A., remainder to his eldest son, or to a limited number of his sons, or to one son only in tail male, or for life, and in case A. dies without issue, over, A. takes an implied estate tail in remainder.² Jarman very justly considers that the phrase, in default of issue, ought always have been construed to be referential only,³ and as equivalent to the phrase, "in default of such issue."

Even as to personalty, the clause, "dying without issue," will receive only the restricted signification when followed by the words "after his decease," (but not

¹ 2 Jarm. 362.

² Stanley v. Lennard, 1 Eden, 87.

³ 2 Jarm. 397.

“after him,)” or, “if he marry without consent, or die without issue.” This latter phrase shows that the testator did not mean to give the devisee an entail at all hazards, but only a fee determinable.¹ This seems to be the true principle of the decision in *Keiley v. Fowler*.² The ulterior legatee in all cases of this sort must be intended not merely to survive the propositus, but all his issue. The context, by reference to a definite period when the issue are to fail, or, by containing powers having only a limited scope, may cut down the phrase, “dying without issue” to failure at the time of the death of the propositus.³

As the American courts incline to ignoring the rule in *Shelley's* case, so they also lean to construing the words “dying without issue,” when unexplained by the context, as denoting a failure of issue at the death of the ancestor. With respect to this rule, the English cases prior to 1838 are more in harmony with those of the United States than where the question relates to the rule in *Shelley's* case. The English courts always inclined, almost as much as our own, to give the phrase, “dying without issue,” a restricted meaning. Old English cases on this question, therefore, are valuable to the American practitioner.

The doctrine of *Forth v. Chapman*⁴ has not been absolutely adopted by the American courts, but their disposition is strong to cut down the meaning of the phrase, “dying without leaving issue,” or, “dying without issue,” to death, or failure at the death of the propositus, even as regards realty. Thus, in *Den v. Schenck*,⁵

¹ *Trotter v. Oswald*, 1 Cox, 317.

² 3 B. P. C. Toml. ed. 299.

³ See further *Dallam v. Dallam*, 7 Har. & J. 220; *Carter v. Tyler*, 1 Call, 143; *Moody v. Walker*, 3 Ark. 198.

⁴ 1 P. Wms. 663.

⁵ 3 Halst. 29.

the phrase, "die without issue alive," was held to impart only the restricted meaning. In *Anderson v. Jackson*¹ the phrase, "the share of the devisee dying without lawful issue, was to go to the survivor," received a similar construction.

But if there is no expression, however slight,² the rule of the common law will be applied, and the failure of issue will refer to all descendants,³ except in those States where a statutory provision exists to the contrary. The American statutes on this point are more satisfactory than the analogous English provision (1 Vict. c. 26, § 29), which relates only to the use of the word "issue," and not "heirs or children."

The rule of construction? adopted by the 29th section of 1 Vict. c. 26, had been previously enacted in Virginia in 1819, in Mississippi in 1824, in North Carolina in 1827, and in New York by the Revised Statutes.⁴ The old rule, however, may apply if the clause refers to a preceding limitation, and it must apply if the context is plain to that effect. In such cases the clause will either raise an implied estate tail in the propositus, or else will render the ulterior limitation void for remoteness. The statutes referred to only operate where the testator's meaning of the words used by him is not clear or defined by the context.

It has been doubted whether, in case of a devise to A. and his heirs, and, if he die without issue over, A. would not still take an estate tail in England and those States which have analogous statutory provisions on this point. It is probable the English Wills Act will be held not to apply to this case. The issue referred to

¹ 16 Johns. 382.

² *Ladd v. Harvey*, 1 Fost. 514.

³ See *Edelen v. Middleton*, 9 Gill, 161, where the cases are examined.

⁴ See 4th Kent, 5th ed. 279.

are comprised in the previous word "heirs." The context thus shows that the testator contemplates a general failure of issue, and not a failure of them at his death. The statutory interpretation of the meaning of the phrase, therefore, seems precluded by the previous devise in fee. But more difficult questions will arise on this head under the American statutes, which (unlike the English act), expressly provides for a death without "heirs" as well as for death without "issue."

In Virginia,¹ Mississippi,² North Carolina,³ dying without issue, heirs, heirs of the body, or children, will mean, whether in a deed or will, a failure of issue at the death of the ancestor or propositus. By the New York Revised Statutes, a remainder, limited after an entail, operates as a contingent limitation on a fee, and vests in possession on the death of the first taker without issue living at his death.⁴

As to the question whether a limitation of personalty to the survivor of several persons, in default of issue of either, involves a restricted construction of the phrase we are considering. See *Cutter v. Doughty*.⁵

If the phrase "importing a failure of issue" is preceded by a power implying a gift in default of appointment to the issue of the donee, living at his decease, the restricted construction will of course prevail in any State.⁶

The rule of construction established by the 29th section of 1 Vic., c. 26, and the analogous American statutes, does not apply if the context implies to the contrary. It will, however, be often still a question of

¹ Stat. 1819.

² Stat. 1824.

³ Stat. 1827.

⁴ See *Hone v. Van Schaick*, 3 Barb. Ch. 489.

⁵ 23 Wend. 518; *Zollicoffer v. Zollicoffer*, 4 Dev. & Bat. 438.

⁶ *Target v. Gaunt*, 1 P. W. 432.

difficulty to determine whether the statutory rule is neutralized by the context or not. The old cases thus continue to have much, though, of course, not the whole of their pristine value, even in those States where the restricted construction obtains by statute.

For further elucidation of the phrases "dying without issue," or "without lawful issue," see *Patterson v. Ellis*.¹

Under the statutory meaning of the word "issue," the remainder man over takes an executory interest which cannot be barred. Under the ordinary meaning of the phrase "dying without issue," the remainder man over takes a remainder, which is at the mercy of the preceding tenant in tail. The enactments on this head are, on the whole, to be condemned, except where they restrict the new meaning of the word "issue" to wills where the propositus takes no estate. For, in those instances where he takes expressly for life, the intention of the limitation over on his dying without issue is certainly to benefit the issue, either as heirs or purchasers. But the act defeats their claims under either head.

¹ 11 Wend. 259; *Norris v. Byea*, 13 N. Y. (3 Kern.) 273; *Dumond v. Stringham*, 26 Barb. 104; *Wilson v. Wilson*, 32 Barb. 328; *Du Bois v. Ray*, 7 Bosw. 244; 11 Wend. 259; 5 Mass. 500.

CHAPTER IX.

JOINT TENANCY.

The law favors the amalgamation of different estates in one person. Hence, perhaps, arose the rule in Shelley's case, and the doctrine of merger. The law also favors the concentration of the estates of different persons in one of them, if the construction will so permit. Hence, *semble*, flowed the motive for its presuming a *jus accrescendi*, under a limitation to several. This doctrine, indeed, is found in Roman law; but under the feudal system the civil law did not prevail of its own authority, but only by its intrinsic merits, and its convenience for feudal purposes.

A devise, like a conveyance, to two or more persons, not being husband and wife, constitutes them joint tenants. The law presumes a joint tenancy in such cases, and equity follows the law. The peculiar incident of a joint tenancy is that, though any of the partners can assign or can devise his share without the consent of the others, these, nevertheless, have what is termed the *jus accrescendi*, or right of survivorship or accruer as to unassigned shares.

This is very convenient in trust estates, as it is not then necessary to seek out the heirs of deceased trustees, in order to convey. The common law of joint tenancy, however, is much infringed upon by statute, both in the United States and in England.¹

At common law there were some nice distinctions

¹ See Kent, 5th ed. 361, 362; *Frewen v. Rolfe*, 3 Br. C. C. 224; *Varnum v. Abbott*, 12 Mass. 474.

between the forms of conveyance open respectively to joint tenants, tenants in common, and parceners. Joint tenants could both enfeoff and release, while tenants in common could only enfeoff, and parceners release. This privilege of joint tenants was important, when we consider the efforts made in early times to devise a system of secret conveyancing by means of releases founded upon nominal leases. As a joint tenant was by statute authorized to dismember the joint tenancy, he could also thus constitute himself a tenant in common any time by deed, though not by will.

The incidents of a joint tenancy at common law are unity of possession or seisin, of interest, title, and time of vesting. Under wills or conveyances by way of use or trust, the last incident is not indispensable. Devisees may take joint interests, and yet come into being or otherwise attain vested interests at different periods of time. For instance, under a gift to A., remainder to the children of B., all B.'s children at the death of A. are joint tenants, although their interests vested at different times.¹

Under a limitation of this kind to a class, some members of which are already born, the natural construction would appear to be to hold the existing members to take as joint tenants, but subject to a divesting of their interests proportionately on the birth of fresh members of the class. The divesting operation cannot affect the quality of the interest taken by the existing devisees more than it can the vested nature of the interest. However, in *Woodgate v. Unwin*² all were held to take in common, while in *Stratton v. Best*³

¹ *Kenworthy v. Ward*, 11 Hare, 196.

² 4 Sim. 129.

³ 2 B. C. C. 233.

all were held to take jointly. The only mode of reconciling these cases is to consider that limitations of realty will be construed more readily than gifts of personalty to be in conformity with the common law presumption in favor of a joint tenancy. The former case was under a will; the latter under a deed to uses. But wills and uses are, as already stated, considered to be on the same footing with respect to common law presumptions. Indeed, neither of the cases referred to can be considered as of much authority. The doctrine in *Kenworthy v. Ward*¹ may, therefore, be considered as the correct statement of the law on this point.

Whether the devise be to several by name, or to a class, they take as joint tenants, and whether they be children, issue, or next of kin, unless there is a reference to the statute of distributions,² or some of the shares are contingent, as when the limitation is to such members of the class as will attain twenty-one.³ The case of *Woodgate v. Unwin*, however, is of no real authority on the point, inasmuch as the principle of the decision, as expressed by the court, was that no interests that vested at different times could be held in joint tenancy, a doctrine long exploded as regards wills and conveyances by way of use.

The exceptions to the rule presuming a joint tenancy in case of a limitation to several are, first, where the gift is to two, being husband and wife. Such a grant or devise constitutes a peculiar tenancy. The donees take by entires, and differ from joint tenants, inasmuch as neither alone can defeat the interest of the other surviving. Another exception exists in the case of partner-

¹ 11 Hare, 196.

² *Bullock v. Downes*, 9 H. L. C. 1.

³ *Woodgate v. Unwin*, 4 Sim. 129.

ship property. A third exception to the rule is, that if a devise or grant be made to two persons who cannot lawfully intermarry, or to two men or two women,¹ and the heirs of their bodies, the donees are joint tenants only for life, with several inheritances in tail. For, it is not possible that they can have a common lawful heir of their bodies. The right of accruer in such a case attaches only to the life interest. The presumption of a joint tenancy is also often varied in equity under contracts where the parties contribute unequally. The slightest indication, too, in a will that the donees are to take in common will be enforced in equity. For the court is ever ready to overrule the common law *jus accrescendi*, on the ground that equality or a tenancy in common is more equitable than a chance game of survivorships. However, if there be nothing in the context to enable the court to carry out its favorite views, it must adopt the legal presumption.

The presumption of a joint tenancy applies to a bequest by way of trust or otherwise, and whether the gift be of a sum of money or of a residue. But, it is possible that a tenancy in common would be more readily inferred in a doubtful case where the bequest was personal than if it be real, just as in conveyances, by way of use or under a will, a tenancy in common may be created by words that would fail to sever the jointure in a deed. As the presumption of a joint tenancy is a common law rule, the further we pass from common law into the region of equity, and still further into that of the civil law and of the ecclesiastical courts, the common law presumption grows weaker. Indeed, equity so favors a tenancy in common that it grasps at any straw in the context* to promote such a construction.

¹ Doe *d.* Littlewood *v.* Green, 1 Mee. & W. 229.

But, if there be nothing of this nature in the context, the Court of Chancery is powerless to ignore the rule of law that presumes a joint tenancy in a gift to two or more, so far as such presumption is practicable.

The presumption of a joint tenancy applies to gifts, to classes and to children. But, if some are unborn, then, as to these, the gift, if it arises under a common law deed, is necessarily in common. For common law estates that vest at different times cannot be in joint tenancy. Yet, as regards the devisees, and especially the members living at the time of testator's death, these, *semble*, take jointly. The case of *Woodgate v. Unwin*¹ differs on this point from *Stratton v. Best*.² But this, as already stated, was a conveyance by way of use, and uses and wills are considered as capable of conferring a joint tenancy, even though the shares vest at different times.

As the court, when enforcing any equity, will carry out its own peculiar rules, so, when executing trusts executory, whether contained in wills or deeds, it will constitute any classes of donees tenants in common.³

The exceptions, then, to the common law presumption (which is followed by equity), in favor of a joint tenancy in a gift to a class, are: 1, where the donées are husband and wife; 2, as to inheritances, but not life interests, where the donees cannot by possibility have a joint heir; 3, cases of partnership; 4, executory trusts. The dictum of Lord Hardwicke in *Bagshaw v. Spencer*,⁴ to the effect that trusts executory do not differ from trusts executed, has been long since overruled.

Executory trusts are directions contained in wills, marriage articles and contracts, to convey or settle

¹ 4 Sim. 129.

² 2 B. C. C. 233.

³ *Marryatt v. Townly*, 1 Ves. Sen. 102.

⁴ 1 Ves. Sen. 142.

property in a certain manner. Such directions are construed differently from clauses in final instruments, the trusts of which are said to be executed or completed. Most wills contain very few executory trusts, as distinguished from executory interests, or future uses or trusts. The testator generally settles the property himself; but if, instead of doing this, he directs a devisee in trust, or the donee of a power to convey land to A. in strict settlement, or to the children of A., equity will, in the former case, direct the conveyance to be to A. only for life, with remainder to his first and other sons in tail, and in the latter case to the children as tenants in common. But, if the devise was a trust executed to A. and the heirs of his body, A. would take an estate tail, while under the devise to the children they would take as joint tenants.

The preceding observations respecting devises and trusts executed apply only where the context discloses no intention on the part of the testator to create a tenancy in common. Any limitation to this effect, of course, will be as legal in a will as in a deed, while many expressions in a will or conveyance by way of use that will create a tenancy in common will not have this effect in a common law deed. Any phrase in a will that imports division by equal or unequal shares¹ will create a tenancy in common.

A tenancy in common has been held to be created by the phrases, "equally to be divided," "equally amongst them," "severally," "equally," "respectively," "part alike," "in moieties," &c.²

Where an ulterior donee, however, is not to take his interest until after the death of a survivor or of

¹ 2 Jarm. 162.

² See *in re* Tiverton Market Act, 20 B. 374.

previous donees, this imports that these take as joint tenants¹ and that the *jus accrescendi*, or accruer, applies to accrued as well as to original shares.²

If the gift is in joint tenancy, and any of the limitations are void, lapse, or are revoked, the remaining donees take the whole. But, if it be a tenancy in common, the heirs will take unless the gift is to a class,³ in which case all the members of the class living at the death of the testator will take.

In *Brownell v. De Wolf*,⁴ a person devised to "all his surviving children in equal divisions" all his real estate, and afterwards, by a codicil, revoked the share of a daughter without limiting any devise over. It was held that, as the devise to the children was in common, the revocation of the daughter's share did not enlarge the estate of the others, but produced an intestacy as to that share.

As to what constitutes a severance of a jointure, see *Gould v. Kemp*.⁵ Even in England the presumption of a joint tenancy is a very slight one, and is daily becoming more evanescent.⁶ In the United States it is nowhere regarded as more cogent than the presumption in favor of the rule in Shelley's case, which, as stated in Chapter VI, may be defeated by any expression, however trivial, to the contrary.⁷

¹ *Doe d. Calkin v. Tompkinson*, 2 Mau. & Sel. 165.

² 2 Jar. 166, note; see chapter 16, *infra*, on Survivorship.

³ *Sackett v. Mallory*, 1 Met. 356.

⁴ 3 Mass. 486; see *Pryor v. Dunkle*, 2 Wash. C. Ct. 416, for a plain case of partial intestacy.

⁵ 2 My. & K. 304.

⁶ See *in re Morse*, 31 L. J. Ch. 363.

⁷ See 4th Kent Comm. 5th ed. 361, 362; 2 Hilliard's Abr. Law of Real Estate, c. 4, pp. 42-4; *Sackett v. Mallory*, 1 Met. 355.

CHAPTER X.

FUTURE ESTATES.

§ 1. *Remainder.*

At common law the feehold could not be first limited on a contingency, but an executory devise may be thus created. A common law remainder should wait until the preceding estate or estates determined, but an executory devise may abridge them. In short, an executory devise is bound by no doctrine of conveyancing, except the rule against perpetuities, and it cannot, like a remainder, be defeated by any incident of the estate of the particular tenant.¹

The framers of the Revised Statutes of New York² have imbued remainders with all the qualities of executory devises, and have also abolished uses, thus copying in the letter the ancient doctrine of the common law judges that there could be no use of a use.

A remainder is either vested or contingent. A contingent remainder fails altogether, if it does not become vested before the period specified in the will. For instance, under a devise to A. for life, remainder to the heir of B., if B. survives A., the heir of B. never takes anything. Contingent remainders are divided by Fearne into four classes. The following remainder is contingent on the four conditions described by that writer. To A. till B. returns from Rome, and from and after the return of B. and C. from Rome, and the death of D., remainder to the heir of E., when he shall attain age. Unless all these contingencies are fulfilled, before

¹ See *Allen v. White*, 16 Ala. 181.

² Vol. I, 728, § 45.

B. returns from Rome, the heir of E. never takes the estate. Executory devises are subject to no legal period like remainders before or at which at latest they must vest. They are, therefore, more advantageous than remainders to devisees. They can only arise under wills or deeds by way of use, and will not be construed as executory even in those instruments if the limitations can by possibility at the time of the testator's decease be deemed remainders.¹ For a common law estate is always presumed, instead of a statutory one. The law of remainders is thus more extensive under wills than would be suspected on first consideration.

Contingent remainders may be preserved from destruction by the particular tenant, by means of a limitation to trustees to preserve the contingent estates. Even where contingent limitations are protected by statute against the merger, surrender, or forfeiture of the estate of the particular tenant, a limitation to trustees to preserve, &c., is desirable, especially if the particular estate may expire by effluxion of time before the remainders can vest, or if the particular tenant is likely to commit waste. For, an injunction will lie against him at suit of a trustee to preserve, &c., who, in turn, will be prevented by the court from concurring in the destruction of the contingent remainders.²

A remainder that may be deemed vested is never construed contingent, for, as the courts incline towards holding interests as common law ones, so also do they favor a vesting. It is often, however, very difficult to determine to what class a remainder belongs. The cases on this question are not at all in harmony with principle. Even the common limitation to trustees to pre-

¹ Doe v. Provoost, 4 Johns. 61.

² See Garth v. Sir John Hind Cotton, 1 White & Tud. Lead. Cas. 604, and notes thereto.

serve contingent remainders is a contingent remainder in point of principle, though the contrary has been repeatedly decided.

In *Olney v. Hull*¹ the devise was to testator's widow while she remained unmarried, remainder on her death or marriage to be equally divided among the testator's surviving sons. This remainder was held contingent. If the testator meant the sons surviving himself, the remainder would have been vested.²

In *Putnam v. Gleeson*,³ the devise was to the testator's daughter for life, and at her death to her heirs and assigns. The remainder was held contingent, as the rule in Shelley's case was abolished in the State. But, a remainder to the testator's heirs would have vested at the same time as the life estate.⁴

The English law of vested and contingent remainders is adopted in the American States.⁵ A remainder, however, has always been more readily held than a particular estate in the United States, to be in fee if there was no word of perpetuity in the context, as, to A. for life, remainder to B. Here B. sometimes took a fee,⁶ even before the recent changes in the laws on this point made by several of the States.⁷ The law of remainders' and executory interests is the same in the United States as in England.⁸ As to vested remainders,

¹ 21 Pick. 311.

² *Emerson v. Cutler*, 14 Pick. 108; see *Manderson v. Lukens*, 23 Penn. St. 31.

³ 99 Mass. 454.

⁴ *Abbott v. Bradstreet*, 3 Allen, 587; *Dunn v. Bryan*, 38 Ga. 154; see *Fetrom's Estate*, 58 Penn. St. 424; *Browne v. Lawrence*, 3 Cush, 390.

⁵ 2 Redf. 247.

⁶ *Plimpton v. Plimpton*, 12 Cush. 458.

⁷ See *supra*, chapter 5, on Devises.

⁸ *Miller v. Chittenden*, 4 Iowa, 252; *Pierce v. Hakes*, 23 Penn. St. 231; *Downing v. Wherrin*, 19 N. H. 9.

see further *Young v. Stover*;¹ see further as to contingent remainders, *Evers v. Challis*.²

As an estate will be construed as a remainder rather than as an executory devise, if both constructions are open to the court,³ so an heir under a devise is deemed in by the common law, unless there is a local statute to the contrary.

§ 2. *Executory Devises.*

Executory devises are springing or shifting uses in wills; in other words, future estates that cannot be construed as remainders. Such future estates either have no particular precedent estate, or else do not come into possession exactly on its determination, but either before or after it. To A. for life, remainder to B. in tail, remainder to the heir of C. in fee. Here B.'s estate is a vested remainder, and that of the heir of C. is a contingent one. It may vest in interest during the currency of the preceding estates, though it cannot vest in possession until both A.'s and B.'s estates determine.⁴ But, if the devises were to A. twelve months hence for life, but if B. marry during A.'s lifetime, then to B. here A.'s estate is a springing use and B's a shifting one, inasmuch as it may abridge A's. interest.⁵ If the limitations were to A. for twelve months, remainder to the heirs of B., a person in existence, yet this estate is an executory devise, since it would be void as a remainder, inasmuch as these interests, when contingent, must be preceded by

¹ 37 Penn. St. 105; *Felton v. Sawyer*, 41 N. H. 202.

² 7 H. L. Cas. 531; 29 L. J. 121; 20 L. J. Q. B. 113; *Stephens v. Evans*, 30 Ind. 39; following 38 Mass. 21; distinguishing 21 Pa. 504; 7 B. Mon. (Ky.) 623; 25 Wend. (N. Y.) 115; 2 Denio (N. Y.), 9; 34 Barb. (N. Y.) 388; 28 N. H. (8 Fost.) 459.

³ *Hawley v. Northampton*,⁸ Mass. 38.

⁴ *Holme v. Low*, 4 Met. 190; *Ide v. Ide*, 5 Mass. 500, 502.

⁵ *Church in Brattle Square v. Grant*, 3 Gray, 150.

one or more estates of freehold, transmitting an unbroken seisin from the owner. Therefore, under a devise to A. for life, and a year after his death remainder to B., this estate to B. is an executory devise, since it would be void as a remainder, the freehold being in abeyance for a year. The law of executory devises is thus exactly coincident with that of uses. Whatever is good as a use is also good as a devise, and, conversely, while if either can, by possibility, be construed to be a remainder, even though contingent, it will be liable to all the dangers that attend that class of estates.

All future bequests of chattels are executory and not remainders, since such interests can arise only in land or other freehold realty, such as rents and incorporeal tenements, which are the subjects of tenure, and imply one continuous and unbroken seisin. A settlement of chattels, consequently, is void at common law, but is good by way of use or bequest.¹ If the chattels are consumable by use, such as hay, &c., they should be sold, and the interest only of the proceeds given to the tenant for life.² The tenant for life is himself bound to convert them, else his estate will be liable for a *devastavit*. The court will compel him to give an inventory, and, in case of danger, security also, that the property will not be wasted.³ An executory devise cannot be defeated in the United States more than in England.⁴ Therefore a gift over, upon the decease of the first taker without issue living at his death, will operate by way of executory devise, notwithstanding any conveyance by such first taker. An executory devise thus differs

¹ See 2 Kent, 5th ed. 352.

² Patterson v. Devlin, 1 M'Mullan, S. C. 459.

³ De Peyster v. Clendinning, 8 Paige, 295; Clark v. Clark, 8 Paige, 152; see *infra*, chapter 24, on legacies.

⁴ Couch v. Gorham, 1 Conn. 36.

from a contingent remainder both in its capacity of defeating previous estates and in being indestructible itself. As executory devises may defeat previous limitations of the same property, they may be limited on a fee,¹ although no remainder can be limited on a fee. An executory devise that abridges a preceding estate is thus of the nature of a condition subsequent. If it does not arise, the preceding estate will continue according to the terms of its limitation.

The chief characteristic and value of an executory interest, as distinguished from a remainder, is that it is indestructible by the merger, surrender, or forfeiture of a preceding estate. The limitation to trustees to preserve contingent remainders (which indeed is, in point of principle, a mere contingent remainder), is no adequate security for the remainders, and the trustee, unless restrained by chancery, may defeat them.

As any interest, however, that can be construed as a remainder will not take effect as an executory devise, because a common law estate is more favored than an equitable or statutable one, so, conversely, any interest that is at the time of the testator's death executory will not afterwards be deemed a remainder, just as an apparent feehold carved out of a chattel is still a mere term of years determinable on an uncertain event. Where an estate is limited on alternative contingencies, there is no reason why, if failing on one of the contingencies to vest as a remainder, it should not arise on the alternative as an executory devise.²

A fee defeasible by an executory devise is still subject to dower, curtesy, &c., and to all the other incidents of a fee. In *Ide v. Ide*³ ulterior limitations after a fee

¹ *Fisk v. Keene*, 35 Me. 355.

² See 1 Jarm. 790.

³ 5 Mass. 500.

were held to be void, even though the fee could only have been a fee tail, since the remainder-men were brothers of the particular tenant. The decision seems to have proceeded on the ground of repugnancy, which is a difficulty the courts will in most cases remove by construction. As executory interests are indestructible, they are subject to the rule against perpetuities.¹

§ 3. *Cross remainders.*

As the word "heirs," is never implied in a deed, a cross remainder by implication can only arise under a will. Cross remainders are of this nature: Where lands are devised to several persons, say parceners, as tenants in tail, and, if they die without issue, or on failure of their issue, remainder over, the question arises on the death of one of the tenants in tail whether her or his share goes to the other tenants in tail or to the remainder-man. When the shares go, as is usual, to the surviving tenants, they are termed cross remainders.²

Formerly it was thought that the context should be strong in order to raise an implication of cross remainders between more than two. Jarman³ accounts for this singular notion by the fact that in *Gilbert v. Witty*,⁴ where this strange doctrine was first propounded, the devisees had not undivided shares in common, but were devisees respectively of separate tenements. However, cross remainders will now be implied under either kind of limitation, and, as regards the number to which such implication may extend, there can be in reason no limit except the number of primary devisees. The implication is not affected by any State statute respecting the meaning of the word "issue," since those enactments

¹ See *infra*, "chapter 26, on Void Testamentary Gifts, § 1."

² *Holmes v. Meynell*, Raym. 452.

³ Vol. II, 459.

⁴ Cro. Jac. 655.

only operate where the will is wholly silent on the question.

The doctrine that there cannot be a possibility upon a possibility appears in several phases of our law. The old rule that cross remainders could only be implied between two seems to be a development of this doctrine, which was invented before it was established that contingent remainders were destructible. The presumption as against implying numerous cross remainders, indeed, arose from the inclination of the courts towards vested interests. But this also sprang from the fear of a contingent perpetuity. It is safe to say that the doctrine that there cannot be a possibility upon a possibility holds now in our law only in the particular case of invalidating a limitation to the unborn child of an unborn child.

But express cross limitations, as at a certain age of the devisees, or if they die under a certain age, will, as a rule, preclude all implication. If the express limitation, however, be to another class of devisees, or relate to other contingencies than those on which the limitation over is dependent, the presumption thence arising is not conclusive against the implication.¹ The question, therefore, as to what kind of context will imply cross remainders in a particular class of devisees in tail is often very perplexing in England, and, as our system of settlement becomes developed, will also become troublesome here.² As the common law favored the consolidation of inheritances, it ought to be supposed to favor cross remainders; yet the dicta, (as distinguished from the cases,) are to the contrary.³ The implication, how-

¹ *Vanderplank v. King*, 7 Jur. 548; *Atkinson v. Barton*, 10 W. R. 281.

² See *Parker v. Parker*, 5 Met. 184; *Rabbeth v. Squire*, 4 De G. & J. 406.

³ *Davenport v. Oldis*, 1 Atk. 579.

ever, is most convenient. In one case its rejection would have entitled a plaintiff to have recovered twenty-five undivided three hundred and sixtieth parts.¹ The phrase "in default of such issue," therefore, will usually raise the implication, unless there is appended the word "respectively," or the like;² though the word "respectively," indeed, in the later cases, is justly considered as without weight,³ since it only expresses what every tenancy in common implies.

In executory trusts the implication will not be excluded even by an express limited direction as to cross remainders.⁴ The reason is that articles⁵ and executory limitations are only considered in equity as imperfect heads of agreement, to which even the potent rule in Shelley's case is inapplicable. Under such instruments, therefore, cross remainders will be implied, not only between children, but also between families.⁶

Cross remainders will be implied, too, not only amongst a whole class of devisees,⁷ but also amongst devisees mentioned by name, or different branches of issue. Convenience was the principle upon which the judges originally sought to consolidate inheritances by implying cross remainders. The same regard to convenience has now led to the extension of the implication to any number or kind of devisees, although judges of the eminence of Lord Hardwicke and Lord Mansfield⁸ placed some technical and temporary barriers against

¹ *Doe d. Gorges v. Webb*, 1 Taunt. 234.

² *Combez v. Hill*, 2 Stra. 969.

³ *Green v. Stephens*, 17 Ves. 64.

⁴ *Burnaby v. Griffin*, 3 Ves. 266.

⁵ *Duke of Richmond's case*, 2 Coll. Jur. 347.

⁶ *Horne v. Barton*, Geo. Coop. 257.

⁷ *Green v. Stevens*, 17 Ves. 75.

⁸ *Phippard v. Mansfield*, Cowp. 797.

raising the implication amongst more than two. Even Blackstone, in his Commentaries, acquiesces in the same views.

The implication, of course, cannot arise without subsequent words; but the addition of the phrase "with remainder" over has been held sufficient to raise the implication.¹ The implication applies to estates for life and, *semble*, so far to chattels as well as to estates tail,² and also to both tenants for life and in tail together where there is a remainder in tail to the issue (as purchasers), of the tenants for life.

Jarman³ considers that the implication does not apply to executory devises in fee, or to bequests of personality. Unless the rule against perpetuities, however, or the incidents of personal property which do not admit of its being entailed with a remainder over, are involved, it does not appear that Jarman's view is at all borne out by the cases he cites. There appears to be no reason whatever for excluding the doctrine from any kind of settlement or of property. Where there is a gift to several persons of the whole interest, with a limitation over in case they die under age, it is surely more reasonable to give those who attain age the shares of those who die during minority than to suffer those shares to pass to the infant's representatives, who, if they are not his issue, certainly are no objects of the testator's bounty. Among the early cases Jarman admits that the implication was applied to executory devises in fee.⁴ It is doubtful whether the later cases have in the least altered the original current of decisions on this

¹ Doe *v.* Burden *v.* Burville, 2 East. 47 n.

² 2 Jarm. 478; Ashley *v.* Ashley, 6 Sim. 353.

³ Vol. II, 482.

⁴ See Scott *v.* Bargeman, 2 P. Wms. 68.

point. In *Skey v. Barnes*,¹ which Jarman regards "as a leading authority on this point, Sir W. Grant expressly held, as to the shares in question, that the contingency had not happened on which they were to be divested."

Great thanks are due to Jarman for his classification of the nebulae of testamentary decisions, but he sometimes seems to err in point of philosophy when he regards the "wilderness of single instances," as collated by himself or his predecessors, as mutually presenting points of affiliation and resemblance to doctrines of regular conveyancing. For one phase of mutual agreement which the cases cited under each doctrine present, we sometimes find fifty of difference and antithesis. As to *Skery v. Barnes*, it is absolutely of no authority on the point in question, as Sir W. Grant, indeed, declared. Not only had the contingency not happened on which the shares were supposed to be given over, but the shares were not given over at all, but a wholly different interest. The testator's children in that case took all his personalty in default of appointment, while the limitation over was only of two pecuniary legacies of £1,000 and £1,500, respectively. If Jarman's doctrine is sound, that cross remainders will not be raised on executory devises in fee, or on gifts of personalty, the doctrine would be inoperative throughout most of the United States where estates tail are abolished or modified; but his position on this head, though supported with his usual strategy, seems naturally weak and unsuited to the purposes of convenience to which the doctrine mainly, if not solely, owed its first rise. To raise the implication, of course, the limitation over must be on failure of issue of *all* the previous devisees.²

¹ 3 Mer. 334.

² See *Doe d. Gorges v. Webb*, 1 Taunt. 234.

In *Powell v. Howells*,¹ A. devised a moiety of land to and between B., C. and D., and to the heirs of their bodies, respectively, and, in default of such issue to any of them, to M., her heirs and assigns. The word "any" was construed "all," and cross remainders were implied between B., C. and D.

Cross remainders are a peculiar phase of implication. Raising estates by implication, as distinguished from a *cy pres* reformation of the text, depends on the limitation over. If this creates a hiatus, the previous limitations being understood literally, these will be expanded so as to prevent an intestacy *pro tanto*, and will provide for the devolution of the interest while *in transitu* to the express limitation over. Therefore, not only cross remainders between persons to whom estates are expressly limited, as well as an enlargement of an express life estate will be inferred from a limitation over, on the previous donee's dying without issue, but an estate will often be implied to a person who is no direct object of gift at all, where the limitation over or the general context implies that there is to be no breach or gap in the series of limitations or any partial intestacy of the owner as to the property in question.

Implications of estates, besides being unknown in deeds, are, in point of fact, not so necessary in such instruments, which are, 1, more carefully drawn, and which, 2, usually create equities by part performance, and thus let in a flood of parol evidence that is inadmissible on a question of construction between different classes of volunteers under wills.

Where there is a remainder to each of the "survivors" in tail, with a limitation over on failure of issue of all the devisees, the word "survivor" will be construed

¹ Law Rep. 3 Q. B. 654.

“other,” and the donees will take cross remainders by express limitation either in a deed or will.¹ In a deed, however, the phrase “heirs of the body” must be used, and not “issue,” to raise an entail either expressly or by implication.

An implication of cross remainders may, of course, be made amongst tenants for life of chattels.² But where the gift over is to the survivors, and there is no gift over on failure of issue of all the donees, the word “survivor” will be construed strictly, and no implication will be raised.³

¹ *Smith v. Osborne*, 6 H. L. Cas. 375.

² *Pearce v. Edmeades*, 3 Y. & C. 246.

³ *In re Corbett's Will*, Johns. Eng. Ch. 591.

CHAPTER XI.

SETTLEMENTS OF PERSONALTY.

An express or implied limitation of personalty, by deed or will to one in tail, gives him the absolute interest, and on his death the personalty goes to his next of kin by operation of law, and not to his issue in tail. This is rule of law which cannot be directly evaded.¹ A *cy pres* construction is, therefore, never applied to limitations of personalty, because, a quasi entail therein would enure to the benefit of the executor, and not the issue of the tenant in tail, if he did not dispose of the property.

It has been repeatedly decided in the United States that a limitation of personalty in tail, gives all to the donee in tail, or, rather to the tenant of the conditional fee on performance of the condition. There can be no remainder limited after a vested entail of personalty.² This rule prevails in Tennessee,³ and most other States. Settlements of personalty should therefore contain a clause, that no unborn issue in tail should take a vested interest in the personalty, until he attains legal majority. On his death under age, the remainder then will take effect. Personalty nevertheless can be settled anywhere by will or deed, just as if it were realty, pro-

¹ 2 Kent Comm. 5th ed. 353; 4 Ib. 283; Smith's Appeal, 23 Penn. St. 9; Moody v. Walker, 3 Ark. 147.

² Ellis v. Merreniack Bridge, 2 Pick. 243; Homer v. Shelton, 2 Met. 194; Exrs. of Moffat v. Strong, 10 Johns. 12; Paterson v. Ellis, 11 Wend. 259.

³ Clark v. Clark, 2 Head, 336.

vided, that the non-vesting clause referred to is inserted, when necessary.¹

Rules of law, however are to be distinguished from rules of construction. Chattels, therefore, cannot be made to devolve as heir looms, but will under such a direction vest absolutely on the first taker,² since a *cy pres* construction is not applied to limitations of personalty.

Still, personal estate if confined within the bounds of perpetuity can be settled by will or in trust in the same manner as realty, provided that there be inserted a clause that no unborn person is to take a vested interest in the chattels, until he attains age. If this clause is omitted, the first *quasi* tenant in tail of the chattels takes an absolute interest, and all the ulterior limitations are void, while if the child dies before he has the capacity to bequeath, the chattels go to his next of kin, and not exclusively to the tenants of any real estate, put in strict settlement with the chattels.

Even with the non-vesting clause, when a child tenant in tail of the chattels attains age, all the ulterior limitations then become absolutely void. But, remainders similarly limited after an entail of freeholds, where such a mode of settlement is legal, remain firm until the tenant in tail obtains possession of the land, or with the consent of the particular tenant dis-entails the estate by a positive act. The remainders of freehold are thus defeasible only, and not void, like remainders after a *quasi* tenancy in tail of chattels.

A person taking a residue for life is entitled to the proceeds, from the death of the testator.³

¹ See *Dunn v. Bray*, 1 Cal. 294.

² *Vaughan v. Burslem*, 3 Br. C. C. 101.

³ *Lovering v. Minot*, 9 Cush. 151; 2 Wms. Exrs. (2 Am. ed.) 997 *et seq.*; *Chestnut v. Strong*, 1 Hill Ch. 123; *Williamson v. Williamson* 6 Paige, 298.

Jarman considers that words of distribution are not sufficient to control the operation of the rule in Shelley's case under a limitation of personalty to A. and the heirs of his body. But, a ready answer to Jarman's opinion is the fact that the rule is inapplicable, except by analogy to interests in personalty, and to make a shadowy analogy a ground for extending a cast-iron rule of tenure is to carry a so called principle, or rather one set of principles exclusively, to a most inconvenient extreme. Much learning hath made many somewhat extravagant in respect to the rule in Shelley's case. In England, Jarman's opinion would probably be followed, but it is certain that in America the issue in tail would under words of distribution to them be held to take by purchase. The early cases are admitted by Jarman to be against his view of the question,¹ and he admits that if the limitations be to A. expressly for life and after his decease to his issue as tenants in common, the rule ought not to be applied.

There can be any number of remainders, or rather executory interests in chattels alternative to a limitation in tail, provided this limitation is kept contingent; as for instance, to A. for life, remainder to his first and other sons in tail, remainder to B. Here if A. never has a son, B's remainder is good. But, when once a son is born to A.; the child takes the absolute interest, unless its vesting is postponed by an express clause to some period within the line of perpetuity. An entail of personalty being equivalent to a fee in realty, there can be no remainder after it, but, as an executory devise may be attached to a fee, so may a similar limitation be appended to an entail of personalty. Such a contingency must of course be on a collateral

¹ Jarm. Vol. II, 492.

event.¹ Thus, under a limitation of personalty to A. and the heirs of his body, and, if A. die without heirs of his body, to B., this limitation to B. is void as a remainder after an absolute interest. But, if the limitation be on an event collateral to the entail, as to A. and the heirs of his body, and if he die without heirs of his body, B. living, then to B., this executory bequest to B. is valid. So if the contingent limitation was to B. if he returned from Rome, just as under a devise to A. and his heirs, and if he die without heirs to B., this limitation to B. is void. But if it is to B. when he returns from Rome, the gift is good. The authority of Jarman is in favor of the position that under a bequest to A. for life, and if he die without issue to B., A. will take under the § 29, 1st Vict. c. 26, and the analogous American enactments, only an estate for life, while his issue take nothing. Jarman says "that under such limitations the construction is free from doubt." But this seems rather doubtful in the absence of adjudication on the point. The context implies a benefit to the issue, either through their ancestors, or by purchase. However in England, probably they would be held to take nothing.

¹ Lamb v. Archer, Salk. 225.

CHAPTER XII.

EQUITABLE CONVERSION.

§ 1. *Its Nature.*

A direction in a will to convert land into personalty or, conversely, to invest personalty in land, or to sell and exchange, operates at once to change the nature of the property into the kind contemplated by the testator. The gift is so to be construed. For, equity deems that as done which ought to be done. The beneficiary, therefore, takes the gift as land or money according to the direction to convert.¹

If the testator directs a sale of his land, the proceeds to be divided, the devisees take their respective interests as personal estate,² and, even if the trusts fail, the fund is personal and falls into the residue.³ The validity and construction of the will, too, will depend on the question whether the limitations are valid as to personalty, but not as to realty,⁴ unless there is a fraud intended to be committed in respect of some statute or rule of public policy.

Money directed to be laid out in land, is thus realty to all intents, and passes under a devise of lands, tenements, and hereditaments.⁵ But, the power to convert

¹ *Lorillard v. Coster*, 5 Paige, 172, 218; *Hawley v. James*, Id. 318, 344; *Bolton v. De Peyster*, 25 Barb. 539; *White v. Howard*, 52 Barb. 294.

² *Drake v. Pell*, 3 Edw. 251; *Meakings v. Cromwell*, 5 N. Y. (1 Seld.) 136.

³ *King v. Woodhull*, 3 Edw. 79.

⁴ *Kane v. Gott*, 24 Wend. 641; compare *Savage v. Burnham*, 17 N. Y. (3 Smith) 561.

⁵ *Lingen v. Sowray*, 1 P. W. 172.

must be an imperative trust power, and not a mere discretionary one, else no constructive conversion takes place,¹ and the property, until the power is exercised, devolves according to its original character as realty or personalty, and if real, it pays in legacy duty. But, if the direction to convert is imperative, the legatee cannot evade legacy duty by electing to take the property in the shape of land.²

If the disposition be illegal, if the property continued real, the conversion will not be deemed to have been made for the purpose of avoiding the illegality.³ Even if the conversion of the realty is postponed until a future date, it will be still regarded as personalty, with respect to the validity of the direction to convert.⁴ But, if one domiciled in New York, devises lands in another State, to be sold for illegal purposes, the trusts are void in New York State, and the trustees will be compelled to convey to the heir.⁵

An unexercised discretionary power never works a conversion.⁶ If the will merely "authorizes and empowers" a sale, the power is discretionary, and not in trust, if the beneficiaries are the same under the power and in default of appointment.⁷

If land is directed to be sold, and the proceeds to be invested in land, the fund continues real, but, if the re-investment is to be with consent, then, it is personalty

¹ *Grieverson v. Kirsopp*, 2 Keen, 653.

² *Attorney General v. Hulford*, 1 Price, 426; *Attorney General v. Ramsay's Trustees*, 2 Crompt. M. & R. 224 n.

³ *Wright v. Method. Epis. Ch. Hoffm.* 202.

⁴ *Vail v. Vail*, 7 Barb. 226.

⁵ *Hawley v. James*, 70 Paige, 213.

⁶ *Slocum v. Slocum*, 4 Edw. 613; compare *Smith v. Kearney*, 2 Barb. Ch. 533.

⁷ *Harris v. Clark*, 7 N. Y. (3 Seld.) 242; see *infra*, chapter 17, § 2 on "Precatory trusts."

meantime. So, if the first sale is discretionary, the fund continues real. The direction to convert must be absolute, in order to alter the character of the property,¹ or, its investment at discretion or interest must be merely a temporary device, until a fitting investment can be had. But, if the trustees have really a discretion as to the conversion, they can at their option alter the devolution of the property as between the real and personal representatives of the beneficiary, or even as between the heir and the beneficiary,² or, if the vesting depend on the sale, the trustees can suspend the vesting.

Where property is directed to be converted for certain purposes, the residue results to the heir or next of kin as realty or personalty, according to its original nature,³ A like rule obtains if the trusts would exhaust the fund, but some of them fail by lapse or invalidity.⁴

The court will, as a rule, regard the beneficiary as entitled to the property, even prior to conversion, and to the proceeds from the time of the testator's death, rather than suffer his interests to depend on the action of the trustees.⁵ Where money is at loan on high interest, and bad security, the executor would, it is thought, be justified in paying a lower rate of interest to the tenant for life of such moneys, and also in capitalizing terminable, and fleeting annuities. But, unless such directions are contained in the will, it is often doubtful whether an executor would be justified in capitalizing or converting in

¹ Thornton v. Hawley, 10 Ves. Sumner's ed. 129 a.

² Brown v. Bigg, 7 Ves. Sumner's ed. 279, note.

³ 2 Story Eq. Jur. 790, note.

⁴ See Ackroyd v. Smithson, 1 White & Tud. Lead Cas. note.

⁵ See 2 Story, Eq. Jur. 790, note; *sub fin.* Gibson v. Bott, 7 Ves. Sumner's ed. 89, note.

any way terminable or other annuities specifically bequeathed in settlement since the testator might have intended certain peculiar advantages for the donee for life.¹ The case is different from a settlement of general personalty or residue.

A testator owning real property in New York and Connecticut, expressly gave to his executors power of sale over the land in Connecticut and directed the whole estate given "to be conveyed, transferred, and paid in fee simple" to &c. It was held that the doctrine of equitable conversion could not be applied to the land in New York.²

If no time is appointed to execute a power, the period for its exercise will depend upon the trusts. If these are immediate, equity will regard the conversion as made at the time of the testator's decease, or at least within one year thereof.³ An unlimited discretion in the trustees as to the time of making the conversion does not affect this rule, where the delay to exercise the power cannot affect the interests of the beneficiaries. Where the period for conversion is deferred, the property retains its original character until then.⁴ Where the will directs a sale from time to time, the conversion takes place constructively at once on the death of the testator. Any time given to the executors will not be deemed discretionary, but merely to mean a reasonable time, even though the executors are em-

¹ See, contra, 1 Jarm. 546; *Howe v. Earl of Dartmouth*, 7 Ves. Sumner's ed. 173, note.

² *White v. Howard*, 52 Barb. 294.

³ *Dominick v. Michael*, 4 Sandf. 374.

⁴ *Hoxton v. Corse*, 2 Barb. Ch. 506.

⁵ *Bunce v. Vander Grift*, 8 Paige, 37.

powered to leave a third unsold for the benefit of the the widow.¹

The beneficiary may elect against the proposed conversion, provided that such option does not affect the interests of other beneficiaries,² and that a sale has not been previously made by the executors.³

¹ *Arnold v. Gilbert*, 5 Barb. 190.

² *Reed v. Underhill*, 12 Barb. 113.

³ *Osgood v. Franklin*, 2 Johns, Ch. 1.

CHAPTER XIII.

TESTAMENTARY GIFT.

§ 2. *Resulting Trusts.*

When a testamentary gift fails by reason of invalidity or disclaimer, there is an intestacy *pro tanto*, if there is no residuary clause, and the property goes to the heirs or next of kin.¹ So, if the trusts of a gift are not co-extensive with the legal interest, there is a resulting trust of the remainder, as in the case last put.² Sometimes it is difficult to determine whether the trustee does not hold the surplus to his own use. If the devise is merely subject to debts, the devisee holds the surplus for his own benefit. But, if it is in trust to pay the testator's debts, the devisee is a trustee of the surplus undisposed of, which he holds for the benefit of the testator's heirs or representatives, as on an intestacy *pro tanto*, unless there is a residuary clause³.

Parol evidence is not admissible to rebut resulting trusts of this nature, since these are in conformity with the letter of the will, and are therefore, inferences of construction, and not equitable presumptions, which conflict with the text of the will, and contradict it.⁴

¹ Bogert v. Hertell, 4 Hill, 492; Hartop's Case, 1 Leon 253.

² Roper v. Ratcliffe, 9 Mod. 171.

³ King v. Denison, 1 Ves. & B. 272; see Stevens v. Ely, 1 Dev. Eq. 493; Wood v. Cove, 1 Paige, 472; Ackroyd v. Smithson, 1 White & Tud. Lead Cas. & notes.

⁴ See Lewin on Trustees, p. 181, *et seq.* and the cases there cited.

If the trusts of property directed to be converted fail, either wholly or in part, there is a resulting trust so far to the heir or next of kin.¹

Where several kinds of wealth are given to trustees, but the trusts declared are not in terms applicable to all the descriptions of property, there is no necessary implication that the trusts extend to more kinds than those described.² A like rule applies where all the trusts relate to all the various kinds of property in the common fund, but are not co-extensive with the legal interest in the trustees. Thus, in *Davis v. Davis*,³ the devise was, "It is my wish that my brother S. be my executor, to arrange, dispose of, and settle all my affairs, and I appoint him guardian to my daughter." It was held the daughter took no interest under the will. The case of *Newland v. Shepard*, *contra* is not now of any authority.⁴

Where there is a devise in trust to sell to pay debts, or for any other limited purpose, any surplus belongs to the heir, even though he get by the will a particular portion of the proceeds of the sale, unless this gift is absolutely inconsistent with his heritable rights. The doctrine of a resulting trust to the heir is the converse of presuming estates by implication in strangers. The construction must be cogent and irrefragable in the opposite direction before the heir can be deprived of any portion of his common law rights. Terms of mere endearment to the devisees in trust will not constitute them beneficiaries.⁵

If the portion of the realty comes to the heir as a chattel, it devolves upon him as personalty, and, on his

¹ *Wood v. Cone*, 7 Paige, 471 ; *De Peyster v. Clendinning*, 8 Id. 295.

² *Stubbs v. Sargon*, 2 Keen, 255.

³ 1 Russ. & My. 210.

⁴ 2 P. W. 194.

⁵ *Wych v. Packington*, 3 Br. P. C. Toml. Ed. 44.

intestacy, goes to his next of kin and not to his heir.¹

There is no resulting trust in England to the heir in case of a gift to a charity. Any surplus will be applied to other charities of a similar nature. In North Carolina, however, and in most, if not all of the United States, a trust for charities will not be executed *cy pres*. In that State, accordingly, there may be a resulting trust for the heir from the surplus of a fund given to particular charities.² In Massachusetts,³ and probably all other States, the English doctrine would not be carried out to its full, or any extent, in behalf of charities where the context of the will was silent on the point.

If a particular tenant disclaims,⁴ the remainder man takes at once, and not the heir. If a particular limitation, however, is void, the heir is let in, unless the gift is not of the land, but of a term, or charge on it, and there is a devise of the land subject to the incumbrance. In this case, if the term or charge becomes satisfied, this will operate for the benefit of the devisee, and not of the heir.⁵

If there be a devise to A. on his attaining twenty-one, but in case he die under age, then to B., the heir at law takes until A. attains age, or the contingency happens. It is very hard to lay down any rules for determining when the heir's rights are excluded by implication. All that can be distinctly noted in the abstract is, that in a really doubtful case the presumption of law will be in his favor. The old, strict rule, indeed, that any

¹ *Levet v. Needham*, 2 Vern. 138.

² *McAuley v. Wilson*, Dev. Eq. 276.

³ See *Casterbrooks v. Tillinghast*, 5 Gray, 17, *infra*; chapter on "void testamentary gifts, § 6 Charitable uses."

⁴ *Adams v. Gillespie*, 2 Jones, Eq. N. Car. 244.

⁵ *Davidson v. Foley*, 2. Br. C. C. 203; see *Sidney v. Shelley*, 19 Ves. 364.

presumption to the contrary should be a necessary one is perhaps now broken down. But still, doubtless, such an adverse presumption must be a strong and cogent one, all the clauses of the will being considered, and sought to have effect given to them. The presumption of law thus stated will, certainly, be extended to next of kin as well as the heir in most cases, if not in all. Indeed, with respect to the present point, the heir is not more favored than the next of kin. The favors he receives relate to rules of law and incidents of property, and not to rules of construction.

Every conversion, however absolute in terms, will be deemed a conversion for the purposes of the will only,¹ unless the testator directs to the contrary, so as to affect the trusts that will otherwise result to his heir or next of kin so far as the trusts fail by lapse, or invalidity, or the non-performance of a condition, or the non-happening of a contingency specified.² A declaration that the proceeds of a sale of land should be deemed personality was held in *Countess of Bristol v. Hungerford*³ not to affect the right of the heir to the undisposed of proceeds of the sale. The authority of this case is endorsed by Jarman and by Lord Brougham in *Atty. Gen. v. Henchman*.⁴ Yet, it is certain that it would not be followed in America, especially as it seems to be overruled by *Phillips v. Phillips*.⁵ Even a conversion for certain specified purposes formerly did not let in simple contract creditors in England, although the fund could only be administered by the Court of Chancery.

¹ See *Fletcher v. Ashburner*, 1 White & Tud. Lead. Cas. 659, 2d ed.; and *Ackroyd v. Smithson*, *Id.* and notes thereto; Am. ed. 690.

² 1 Jarman. 559.

³ 2 Vern. 645.

⁴ 2 My. & K. 484.

⁵ 1 Russ. & My. 649.

Nor will the residue undisposed of even now pass there by a general bequest of personalty in the same will, unless there is a declaration in the will that such residue is to be deemed personalty,¹ or it is thrown into a mixed fund, and there is a general residuary legatee.²

Unless the testator has directed a conversion out and out, and not merely for specified purposes, the residue retains its original character and incidents of realty or personalty, as the case may be. There is no equity between the heir and next of kin, to put the court in motion in such cases.³ But if the testator directs an absolute sale of land and bequeaths the proceeds to A., who dies after surviving the testator, the property goes to A.'s next of kin, and not to his heir. Land of an infant, sold pursuant to a license of court, also becomes personalty, and goes to the infant's next of kin. So do damages paid for the land of an infant taken for public use.⁴

The heir or residuary devisee is entitled to a sum expressly excepted out of the proceeds of land directed to be sold, or the trust of which is void.

Where a partial interest in lands directed to be sold results to the heir, it is personalty in his hands; *aliter* if all the trusts for conversion fail.⁵

A security taken upon a sale of land directed to be converted is, like the land itself, personalty, and can be conveyed with a good title by any of the executors to a *bona fide* purchaser.⁶

¹ *Collins v. Wakeman*, 2 Ves. Jun. 683.

² *Hutcheson v. Hammond*, 3 Br. C. C. 148.

³ *Evans v. Kingsbury*, 2 Rand. 129; see *Holland v. Cruft*, 3 Gray. 162.

⁴ *Emerson v. Cutler*, 14 Pick. 108; see *Holland v. Adams*, 3 Gray, 190.

⁵ *Smith v. Claxton*, 4 Madd. 493

⁶ *Bogert v. Hertell*, 4 Hill, 492.

Parol evidence is never admissible to rebut a resulting trust¹ to the testator's heirs or next of kin. The statement in Jarman² to the contrary is erroneous. Parol evidence is admissible only to rebut or support equitable presumptions that are contrary to the letter of the will, as in the case of double portions, repetitive legacies, and the like. But the evidence has no relation to presumptions founded upon the construction of a particular will, and in accordance with its letter.

¹ See *Supra*, Part I, 274.

² Vol. I, 357, Am ed.; query as to *Jones v. McKee*, 3 Barr, Penn. 496.

CHAPTER XIV.

IMPLIED GIFTS.

An interest is impliedly given to one when he is referred to in a will in an indirect manner, yet with such relation to a direct gift to another as to show that the testator intended for him a benefit, which is reflected from the terms of the direct gift. The implication, when it arises from the relationship of any of the parties to the testator, cannot, doubtless, be supported or impugned by parol evidence. This must be confined to the fact of the relationships. When an implication arises solely on the construction, parol evidence is not admissible. As to parol evidence in relation to equitable implications, see, *supra*, Part I.¹

However, an heir or next of kin is held to be disinherited only on a necessary implication. This tends to give certainty and consistency to this branch of testamentary law, which, as it relates to the words of donation and not merely to the subject or object of gift, is not open to parol evidence.

The implication must be stronger than a mere conjecture, and must be the only conceivable inference on the particular point.² A numerous class of interests by implication arises with respect to precatory powers, where the terms either give the donee an implied life interest, or else the whole property, if the direction to

¹ 264, *et seq.*

² *Rathbone v. Dyckman*, 3 Paige, 9; *Grout v. Hapgood*, 13 Pick. 164, *Jackson v. Billinger*, 18 Johns. 368.

convey in trust is not sufficiently mandatory. An express gift of course precludes all implication on the same point.¹

It has been frequently held that an heir-at-law can be disinherited only by necessary implication.² Thus, a devise to him after the death of A. gives A. a life estate by implication. But a devise to B., *a stranger*, after the death of A., gives A. no life estate by implication. The inference does not arise in the case of a devise to one of several co-heirs, or to a son who is not the heir-at-law at the time of making the devise.

Where there is a devise to the heir and other persons after the decease of A., the ground for necessary implication does not exist. Yet, the contrary was held in *Blackwell v. Bull*,³ although, of course, the testator might have meant that the heir was to take the intermediate interest during A.'s life.

If the devise to the testator's heir be in case A. die without issue, then A. takes an estate tail by implication, if the meaning of the word issue is not affected by a local statute. So, under a devise to A. for life, and if he die without issue then to B., A. takes an estate tail. So if the devise be to B. in fee in case of A., the testator's heir dying without issue, A. takes an estate tail, unless the meaning of the word issue is abridged by statute. If the devise be to A. for life, and if he die without issue living at his death, then over, the issue would seem to take an estate tail by implication;⁴ else the property goes neither to them nor to the remainder man, as Jarman justly observes.⁵ A devise after the general failure of issue of any one, be it re-

¹ *Joiner v. Joiner*, 2 Jones Eq. 68.

² *Roosevelt v. Fulton*, 7 Cowen, 71.

³ 1 Kee, 176; see *Dashwood v. Peyton*, 18 Ves. Sumner's ed. 27, 49.

⁴ See *Mandeville's case*, Co. Litt. 26 b.

⁵ Vol. I, 490.

membered, is void for remoteness, unless the propositus take either expressly or by implication an estate tail.

Where the income is disposed of during the joint lives of several, with a gift over on the decease of the survivor, all the intermediate interest accruing between the determination of the joint lives and the death of the survivor, belongs to the survivor, by the right of accruer incidental to a joint tenancy.

A devise to B., after the death of A. under age, will give A. an estate by implication if B. is the testator's heir, just as if the devise were to him simply after the death of A. But this inference does not arise if B. is a stranger. The estate, however, which A. will take is not necessarily a fee, since the inference is not unavoidable that he is to take merely a life estate when of age.¹

If land be devised expressly or by implication to A. in fee, and, if he die under age or without issue, or subject to any other legal contingency, over, the word or will be construed and, so that the devisee over will not take unless both the specified contingencies happen. But if the devise be to A. for life or in tail, this rule does not apply.² Its object is to benefit the issue by descent and not by purchase. But this aim is precluded when the propositus is only tenant for life, and is not necessary where he is already tenant in tail. Only for the double contingency the devise in fee to the first taker would be cut down to mean an estate tail, as a devise to A. and his heirs, and if he die without heirs of his body to B., this gives A. only an estate tail. But under the rule in question he takes not an estate tail with a remainder over, but a fee subject to an executory devise.

¹ 1 Jarm. 480, note

² *Fairfield v. Morgan*, 2 B. & P. N. R. 38.

³ *Mortimer v. Hartley*, 6 Exch. 47.

In wills, when the word issue points to the death of the propositus and not to a general failure of his issue, Jarman thinks that under a devise to him for life, and if he die without issue remainder to B., the issue take no estate by implication. This, doubtless, is the true rule if the rights of the heir are not to be invaded except by necessary implication; but this particular question has been so fenced by authorities on the meaning of the word issue as an inheritable term significant of *heirs* of a particular kind that the word seems to give the issue estates by implication. The object of the statutory rule which cuts down the meaning of the term issue, is to prevent the limitation over from being void where the preceding donee does not take an estate tail, and not to abridge estates impliedly limited by the context. But where the limitation over is on a failure of the issue of a person who is no relative of the testator, and to whom no interest is given, the same reason for implying an estate in him or the issue does not exist. It may seem bold in me to impugn the positions of an author on whose resources I have so largely drawn. The weakness of my attacks, however, against such a giant renders further apology from me unnecessary.

If there is a preceding express devise for life of part of the lands, to the person on whose death the devise in question is to take effect, implication is avoided, and the devisees over take immediate estates in the rest of the lands, and a remainder after the decease of the tenant for life in the lands devised to him.¹ A residuary devise also rebuts any implication of the kind now, under inquiry. Jarman

¹ Cook v. Gerrard, 1 Saund. 183.

thinks¹ that where the will contains a residuary devise, a devise of particular lands to the residuary devisee, after the death of A., a stranger, gives A. an estate for life by implication. But, a residuary devisee is not as favored in law or equity as an heir-at-law. There is not the same presumption in his favor, nor any *a priori* presumption at all that he is universal residuary devisee. Consequently there is not the same ground for implying an estate in A. when the residuary devisees enjoyment of certain lands is postponed until A.'s death. A thousand reasons might have each of them influenced the testator to make such a disposition of the particular lands.

The case of *Harman v. Dickinson*² exemplifies the extent to which the courts will go in construing a devise according to the intention, even where the words used are by no means adequate to declare that intention with any degree of accuracy. There was a bequest to two grand-daughters by name of equal sums for life, and to their children respectively. But, if either died without issue, her share was to go to the children of the surviving one. One married and died leaving children; and, subsequently, the other died unmarried. The children of the first were held entitled, though not children of the "surviving grand-daughter." So, a bequest to several during their joint-lives enures to the survivor.

A devise of land over after the death of the wife gives a life estate to the wife and a fee to the devisee by implication. So a devise to B., on A.'s dying under twenty-one, implies that A., if he attains age, is to have a fee.⁴ Implying a life interest in this way, it is said,

¹ Vol. I, 475.

² 1 Br. C. C. 91.

³ *Smith v. Oakes*, 14 Sim. 122; see chapter 16 on "Survivorship," *infra*.

⁴ *Cassell v. Cooke*, 3 Serg. & R. 290.

will not be done if the subject is personalty.¹ Yet the widow not being heir does not take the whole realty on intestacy. There seems, therefore, to be every reason to contend, on the principle of *Cassell v. Cooke*, that the rule in question applies to personalty. Such cases are distinguishable from residuary devises wherein the beneficiaries take nothing whatever by act of law but only by construction of the will. The doctrine of implication is not one of tenure, according to which the heir alone is favored, but is one of construction generally, although it may happen as an indirect consequence of the favor with which the heir is regarded by the law, that he is held to take where an implication would be raised if the disposition related to personalty.

It has been thought that a devise to the survivor of several persons gives estates to all by implication. But this is doubtful.² The implication is not a necessary one, and the heir, it is to be remembered, is not to be disinherited on a mere conjecture.³

An exception, however, of part of certain property may operate as an implied gift of the remainder, or even as an execution of a power over it.⁴ And where a testator has omitted words which are necessary to express the meaning intended, and the intended meaning is clearly inferable from the rest taken as a whole, the court will by construction supply the omitted words.⁵ A testator made no other provision for his widow than the following: "After paying my debts, I give to my beloved wife, C., in trust for the maintenance of herself

¹ *White v. Green*, 1 Ired. Eq. 50.

² See *Saunders v. Low*, 2 Sir W. Bl. 1014; *Wainwright v. Wainwright*, 3 Ves. 558.

³ *Manigault v. Deas*, 1 Bail. Eq. 298; *Rathbone v. Dyckman*, 3 Paige, 9.

⁴ *Walker v. Mackie*, 4 Russ. 76.

⁵ *Kellogg v. Mix*, 37 Conn. 243.

during her life, and of my daughter E., so long as she remains single, and to my son G., \$400 a year to be paid by my trustees." A previous clause had given the entire property to trustees for purposes to be afterwards stated in the will. No other disposition of the income, which was \$4,000 a year, was made during the life of the widow; but the income was given to his children after her death, and any appropriation of the principal of any part of the estate before her death was forbidden unless with her consent, and she was to have the entire use of her portion of the estate until her death.¹ It was held that the testator intended to give his widow the *net income of the estate* during her life, except the \$400 given to his son, and that those words should be supplied in construing the legacy to her.² As to implied gifts under powers of selection or distribution, see chapter 15, § 2, *infra*, on precatory trusts.

A recital does not necessarily pass an interest.³ But if a testator recites in part of his will that he has conveyed an interest to a certain person, this operates as a conveyance, if no such clause as that to which the testator refers is found in the will.⁴ Yet a mis-recital of a will in a codicil will not operate as a revocation *pro tanto*, unless there is a plain indication of an intention to revoke.⁵

An executor may be appointed by implication. Therefore the assigning executorial duties to one impliedly appoints him executor.⁶ As to implied powers, see chapter fourteen, *infra*, on Limitations to Trustees.

¹ See *Holms v. Williams*, 1 Root, 332; *Eatherly v. Eatherly*, 1 Coldw. (Tenn) 461; *Chappel v. Avery*, 6 Conn. 31.

² *Kellogg v. Mix*, 37 Conn. 243.

³ *Wright v. Wignell*, 2 Vent. 56.

⁴ *Tilly v. Collyer*, 3 Keb. 589.

⁵ *Skerratt v. Oakley*, 7 Durn. & East, 492.

⁶ *Exp. McDonnell* 2 Bradf. 32; *Exp. McCornick*, Id. 169.

CHAPTER XV.

LIMITATIONS TO TRUSTEES.

Devises are executed by the statute of uses. The fact that the statute preceded the statute of wills is an argument in favor of this theory, and not against it, as has been imagined. For, the statute of wills, by authorizing conveyances by will, put them on a level with conveyances by deed. However, the point is practically immaterial, since all admit that testamentary uses are executed by the intent, under the statute of wills, if not under the statute of uses. The statute of uses, indeed, does not "forbid the limitation of a use," as Jarman, strange to say, alleges.¹ For that doctrine was the invention of the courts of law, and not a provision of the statute; but such limitations in wills are, of course, construed by analogy to deeds; or, rather, the statute of wills, if not governed by the statute of uses, at all events, does not enlarge the operation of that act, so as to make it execute a use upon a use in a will. The difficulty suggested in Sugden on Powers,² as to a lapse of the legal estate by the death of the devisee to uses in the testator's lifetime, does not appear to exist; since the courts would hold that there was an intention on the part of the testator of substituting the trustee's heir, in such an event, in place of the trustee, in order to have the use executed.

There certainly does not seem to be the least neces-

¹ Vol. II, 145.

² Vol. I, 6th ed. 173.

sity for devising to the *cestui que use* at once, so far as the doctrine of lapse is concerned; although, if the trustee be an alien or a corporation, and incapable of taking or transmitting a seisin, the question would be different and much more difficult. In such a case, however, the court, which never wants a trustee, would constitute the testator's heir a constructive trustee or grantee to uses.

A devisee to uses will take a legal estate, and not merely a momentary seisin, if the devise be unto his use, as in a deed, or if any active function be imposed on him. But a limitation "unto and to the use" of trustees will not necessarily give them a fee, nor any quantity of estate greater than the necessities of the trusts require. If their duties in respect to the trusts¹ imply that they should have the whole legal fee, this presumption will be a conclusive one, and will not be rebutted by direct limitations to beneficiaries in other parts of the will.² There need not be a direct limitation in the will to the trustees, in order to give them the legal estate. Any indication that A. is to receive the rents, and pay them to B., will give A. the legal estate.³ The questions, therefore, whether trustees take any, and, if any, what quantity of legal interest, is to be determined by the nature and extent of the *active* duties, or of the trusts imposed on them.⁴

If the will be an appointment, the devisee to uses takes the legal estate. For, appointments are mere limitations of uses, and a use on a use is not executed. Therefore, testamentary appointments should be made directly to those intended to take the legal estate.

¹ See *Curtis v. Price*, 12 Ves. 89; 2 Jarm. 214.

² See *Sandford v. Irby*, 3 B. & Ald. 634.

³ *Doe d. Homfray*, 6 Ad. & Ell. 106.

⁴ 2 Jarm. 213.

Indeed, as to appointments under special powers, even the devisees in trust must be objects of the power, or they will take no estate whatever. It is not likely, however, that, under special powers, limitations to uses, and not directly, need be often resorted to, except in the case of the minority of the beneficiaries to whom, prior to their attaining age or marrying, an appointment is rarely directed. Trustees under special powers, though not taking any estate, would doubtless be held by the court to take powers of curatorship and tutelage.

Copyholds and interests, such as leases for years and personalty, not within the operation of the statute of uses, should also be devised directly to the persons intended to take the permanent legal interest. If the testator has not himself the legal estate, it does not pass to the trustees, and, if they have no active duty to perform, the *cestuys que trust*, and not they, take the equitable estate. In such a case, trustees take no estate, either at law or in equity,¹ more than when they merely take a momentary seisin to uses under a common law deed or a will.

A devise of land to trustees in trust, to pay the rents and profits to A., gives the legal estate to the trustees according to the intention. It is equivalent to a limitation unto and to the use of the trustees and their heirs in trust, &c. But, if the devise be merely to permit A. to take the rents and profits (not "net" rents and profits), the use is executed in A., and he takes the legal estate.² If the devise be in trust "to pay unto, or permit and suffer A. to receive the rents," A. takes the legal estate. For, of two repugnant limi-

¹ 2 Jarm. 218.

² Doe *d.* Leicester *v.* Biggs, 2 Taunt. 109; Barker *v.* Greenwood, 4 M. & W. 429.

tations, the latter prevails. Jarman suggests that the clause gives the trustees an option. If the trustees are authorized to manage the estate, or pay taxes,¹ or if the purposes of the trust, as if it be for the separate use of a married woman, imply the active intervention of the trustees, they take the legal interest.

Trustees take no estate, legal or equitable, but only a momentary seisin in the following devises: To trustees and their heirs in trust, for A. for life, remainder to B. and his heirs, or in trust to permit A. to receive the rents during his life, remainder in trust to permit B. and his heirs to receive the rents.

If the limitation be to trustees and their heirs, in trust to pay to A. the rents for his life, and after his decease in trust for the heirs of his body, the rule in Shelly's case will not apply, as the trustees take the legal estate only for the life of A. His life estate, therefore, alone is legal, the remainder is equitable; and estates of different quality do not coalesce according to the rule in Shelly's case. The heir is thus in by purchase.²

To trustees and their heirs to pay the rents to A. during his minority, remainder in trust for A. and his heirs. Here the trustees take only a term terminable with A.'s minority. The courts thus incline to executing uses and trusts, and will do so as soon as the purposes of the limitation to trustees are satisfied, whether the trustees are to preserve contingent remainders or not,³ unless the phraseology used shows an intention on the part of the testator that the trustees are to hold the legal estate. Such an intention will be indicated by a

¹ See *Gregory v. Henderson*, 4 Taunt. 772.

² *Watson v. Pearson*, 2 Exch. 581.

³ *Doe v. Hicks*, 77 R. 437; *Doe d. Player v. Nichols*, 1 B. & Cr. 336.

technical limitation unto and to their use,¹ or if purposes here and there in the will render it expedient that they should retain their fiduciary functions, and therewith the legal estate.² Even if the trustees get an express fee, they only take the legal estate so far as the purposes of the trust require. If these are indefinite, their estate is now held to be equally so. *For a fee always passes to them if the purposes of the trust require it. Therefore, although a general devise of land conveys only a life interest to the beneficiary, yet a devise unto and to the use of A., in trust for B. and his heirs, gives A. the legal fee. Where the amount of the rent is stated in the will, or there is a general reference to the annual rents, and a direction to apply them in the payment of certain specified charges, it would seem, on principle, that the trustees take only a term determinable on the payment of the charges, just as a rent-charger in equity, or a tenant by elegit, is held to be only a termor, inasmuch as, by computing his debt with the amount of the annual rents, the duration of his possession can be accurately defined. But this is the meaning of a term of years. It is a certain estate in land, and, not like a freehold, one that is of uncertain duration.

The early cases accordingly, and even some of the later ones,³ give the trustees under such limitations indefinite terms,⁴ if the devise be to them, or to them and their executors, to pay debts and legacies, raise a sum of money, or secure a jointure. If the devise was to them and their heirs, they took, in the earlier cases,

¹ *Doe v. Field*, 2 B. & Ad. 564.

² *Harton v. Harton*, 7 T. R. 652.

³ *Wykham v. Wykham*, 11 East, 458; *Ellis v. Page*, 7 Cush. 164, 165.

⁴ *Cordall's Case*, Cro. El. 315; *Doe d. White v. Simpson*, 5 East, 162; *Ackland v. Lutley*, 9 Ad. & El. 879.

a determinable fee.¹ But the later authorities decide that, as the use of the word heirs will not give trustees the fee, if the trusts, lasting only a certain time, as, for instance, to preserve contingent remainders,² do not require a fee, so, conversely, if the trust to pay debts be spread over an indefinite period, the trustees take the fee and the remainders, or rather the executory interests over, will not be legal estates.³ A devise to trustees, therefore, to pay debts would, in England, even before 1st Vict., c. 26, give them the fee if the trusts were at all scattered, or if convenience would require the trustees to have the legal estate, and even though the personalty were the primary fund for payment of debts. A mere charge of debts, however, has no effect on the quantity of estate taken by the trustees,⁴ and, if the devise is to them on condition, or in case the personalty prove deficient, they take no estate until the contingency happens. But then they take a legal fee.⁵

It is provided in England, by 1 Vict., c. 26, § 30, that in future, trustees under wills are not to take an indefinite term of years by will. But, where the charges are *specified*, perhaps their estate is a *definite* term by implication. This point, indeed, has been decided the other way as regards annuities charged on the land, and not merely on the annual rents.⁶

Yet, in analogy to an estate by statute merchant or

¹ *Glover v. Monckton*, 3 Bing. 13.

² *Doe d. Compere v. Morris*, 7 Durn. & East, 433. See *Smith v. Dunwoody*, 19 Ga. 238.

³ *Doe d. Davies v. Davies*, 1 Q. B. 430; *Poad v. Watson*, 6 El. & Bl. 615; *Harton v. Harton*, 7 Durn. & E. 652. See *Hawkins v. Luscombe*, 2 Swanst. 391.

⁴ See 22 & 23 Vict. c. 35, § 14, *et seq.*; 1 Vict. c. 26, §§ 30, 31.

⁵ *Doe d. Cadogan v. Ewart*, 7 Ad. & El. 636.

⁶ *Fenwick v. Potts*, 8 D. M. G. 506.

elegit, the position seems sound, in point of principle, that trustees for incumbrancers ought to be deemed to take only the estate which the owners of the charges could claim, and that when these could not sell the fee, the trustees likewise should not be deemed to have greater power.

A direction that executors shall pay testator's debts gives them only a power to sell, and not an estate, and does not enlarge any express estate given to the trustees.¹

The estate which trustees take under an ambiguous context may, in England, be much influenced by the enactments referred to.

A devise to trustees and their heirs, on limited trusts, followed by a power of sale or of leasing, gives them the fee.² So does a devise to them in trust to convey the fee.³ But, if they are empowered merely to devise, the implication is not made,⁴ and, if the devise is not to them and their heirs, or generally, but merely for life expressly, this express estate is not enlarged by the addition of a power, unless the general context also implies a fee.⁵

Semble, conveyances by will are construed much more liberally, and in accordance with the intention of the settlor, than conveyances by way of use, in deeds. For instance, if there is once a limitation in a deed of the fee to trustees and their heirs, to preserve contingent remainders without adding "during the life" of

¹ *Doe d. v. Claridge*, 6 C. B. 641. As to the question whether executors take a power of sale by implication, see *Joshua Williams upon Real assets*, and the notes to *Silk v. Prime*, 2 White & Tud. Lead. Cas. 82.

² *Watson v. Pearson*, 2 Exch. 581.

³ *Doe d. Shelley v. Edlin*, 4 Ad. & Ell.

⁴ *Doe v. Howland*, 8 Cow. 277.

⁵ *Jackson v. Robins*, 16 Johns. 588.

the particular tenant, the fee remains with the trustees.¹ But, in a will, the addition of the word heirs give trustees to preserve merely an estate *pour autre vie*, unless the trust or purpose of the will requires that they should take a greater estate. Yet, in *Venables v. Morris*,² which was the case of a deed, the arguments and judgment on the construction appear to have been founded mainly on the intention and not on the letter of the limitations. Jarman³ disapproves of the case on the ground that a limitation to trustees and their heirs for certain trusts, including a power to appoint the fee, should not be held to give the trustees the legal fee, merely because the appointment *may* be of a contingent remainder, which would require a legal estate in a trustee to protect it. It certainly does seem strange to construe a legal fee to be in trustees, and thus to render all the ulterior limitations equitable, merely because an appointment *may* be contingent. If the trustees take the legal fee, the appointment, indeed, can be only of an equitable interest, which is indestructible by a particular tenant. But the donee of the power can make it undestructible if he pleases. Jarman's opinion, therefore, on *Venables v. Morris*, appears to be right. The argument for holding the legal fee to be in the trustees does not appear to be so strong where the deed contains a power to appoint in fee, as where the document actually contains a contingent limitation. For, where there is a power to appoint the fee, the power is executory, and the Court will direct under its execution a limitation to trustees to preserve, &c., when necessary. On principle, therefore, the primary trustees should not always, in the same circumstances, necessarily be deemed to have the legal estate, that is, a legal fee for this purpose.

¹ See Fearn, p. 56 *et seq.*

² 7 Durn. & E. 342 and 437.

³ Vol. II, 227.

Indeed, the mere fact of a contingent remainder in a will, whether directly limited or to be raised under a power, does not *simpliciter* raise a conclusive or, indeed, any presumption that the testator intended it to be indestructible. If he uses technical language, and yet omits a limitation to trustees to preserve, etc., the inference is that he meant the contingent remainder to take only its natural course.¹ However, in *Houston v. Hughes*,² the circumstance that there was a contingent remainder in the will was considered by the Court an element for holding that the legal estate was in the trustees. Unless technical language is aptly used, it is likely, indeed, that the limitation of a contingent remainder is an element in favor of the position that the trustees take the legal fee. But, if the testator has not the legal estate himself, or if the will comprises only personalty, contingent limitations of which do not need protection, there is, of course, no reason for enlarging the estate of the trustees by reference to contingent limitations of such property.

If other devises or trusts give the trustees an absolute property in the subject matter of such trusts, there is a presumption that they take the fee also of real estate where the context is ambiguous;³ but a devise of land to trustees and their heirs, with power of sale, is not inconsistent with an executory devise of the fee to others after a life estate.⁴

Under a devise of lands in Maine to trustees and their heirs,⁵ to the use of R., the testator's son, for life, remainder to trustees to preserve contingent remainders,

¹ See *Heardson v. Williamson*, 1 Keen, 33.

² 6 Barn. & Cress. 420.

³ *Houston v. Hughes*, 6 Barn. & Cress. 403.

⁴ *Ward v. Amory*, 1 Curt. C. Ct. 419.

⁵ *Webster v. Cooper*, 14 How. 48.

remainder to the sons of R., if any, as tenants in common in tail with cross-remainders, remainder to R.'s daughter, E., for life, remainder to trustees to preserve, &c., remainder to the sons of E. in tail, it was held, 1, that the devise did not vest the legal estate in the trustees; 2, that the estate of R. and the remainders limited thereon were legal estates; 3, that E. did not, under the rule in Shelley's case, take an estate tail; 4, that, upon her death, her two sons took as purchasers each an estate tail in a moiety of the land as tenants in common. This decision shows that the American rules of conveyancing by will to trustees are exactly the same in principle with the analogous English system. Uses, remainders, and limitations by way of purchase, are, in the main, construed in the two nations in the same manner.

Mortgages for years are chattels even at law, and will not pass under a general devise of land, if the gift will be otherwise operative.¹ All interests and charges created out of chattels real are also of the same personal nature.

An equity of redemption subsequently acquired by foreclosure will not pass by a devise of the mortgage,² which will in all cases be construed as conveying only the legal estate, unless, owing to long possession, a release of the equity of redemption will be presumed,³ or there be a local statute, presuming all wills to speak from the date of the testator's death.

A specific devise of land held in mortgage, and *a fortiori*, a general devise of land will not carry the ben-

¹ *Roe & Pye v. Bird*, 3 Black. 1301; *Rose v. Bartlett*, Cro. Car. 293.

² *Ballard v. Carter*, 5 Pick. 112; *Brigham v. Winchester*, 1 Met. 390; 1 Jarm. 654.

³ As to such presumption, see 2 Story, Eq. Jur. § 1520; *Gates v. Jacob*, 1 B. Mon. 308; *Fenwick v. Macey*, 1 Dana, 279.

eficial interest of a mortgage,¹ unless the testator is in possession, or puts the land in settlement.² Yet, it was held in *Mather v. Thomas*,³ that land held in mortgage will pass under a gift of debts and securities for money. As to the expressions creating a trust or beneficial interest, see *Taylor v. Plaine*,⁴

The devisee of an estate which is stated in the will to be under a contract for sale takes only the legal interest.⁵ Yet, if after the devise of an estate which the testator contracted to sell the bargain fails, *Jarman*⁶ thinks the devisee holds beneficially. But this seems to construe a will by an event not referred to in the document. The devisee ought rather, perhaps, be held a trustee for the heir, assuming that, if the contract was executed, the devisee would still be a mere trustee for the next of kin. A testator who recites that he has contracted to sell his estate is a mere trustee, and a devise of the land, subject to any implied trust thereout arising, ought not to have the effect of substituting in any event the devisee for another beneficiary. The only rational ground for *Jarman's* opinion on this point is the unreasonable nature of the decision in *Knollys v. Shepherd*, which did not give the devisee any beneficial interest. But, whatever estate a devisee takes by construction, cannot be lessened by accident or any subsequent event, except ademption.⁷

A direction that all the residue remain in the hands of the executors or under their control, for the use of the testator's wife and children while under age, and that

¹ 1 Jarm. 634.

² *Woodhouse v. Meredith*, 1 Mer. 450.

³ 10 Bing. 44.

⁴ 31 Md. 158; *Freedley's Appeal*, 60 Pa. St. 344.

⁵ *Knollys v. Shepherd*, cited 1 Jac. & Walk. 499.

⁶ Vol. II, 652.

⁷ See *Craig v. Scobie*, 3 Wheat. 563, 577.

after the youngest child shall have arrived at age, the same shall be divided among the children, does not give the executors an estate in trust.¹ But, where the will gave the executors control of the realty, which they were to rent and pay the annual charges, and some annuities, and apply the balance of rents towards payment of certain mortgages, the satisfaction of which was the only limitation on the duration of their trust, it was held that this clause created a trust in the executors, which was void for suspending the power of alienation for more than two lives in being, but that the annuities were separable from the void parts of the will.²

As to the changes made in the law of trusts by the New York revised statutes, see *Lang v. Rofke*.³ By these statutes, all trusts except certain express ones are abolished. Trusts not authorized by these statutes can operate only as powers in trust.⁴ The statute does not apply to trusts of personalty, nor to mortgages,⁵ but it extends to charitable and all other uses, unless they are expressly protected by subsequent statutes. The civil code of Louisiana⁶ prohibits substitutions and *fidei commissa*, or trusts. The person to take must be *in esse* and designated in the will.

By 1 Vict., c. 26, §. 30 and 31., a limitation to trustees is to be deemed to pass the fee, no matter whether the trusts exhaust the whole interest or not. It is still questionable in England, however, whether under an ambiguous will, trustees take any estate or only a power, and, if they take an estate, whether it be for life

¹ *Burke v. Valentine*, 52 Barb. 413.

² *Killam v. Allen*, 52 Barb. 605.

³ 5 Sandf. 363.

⁴ 1 Rev. Stat. 727.

⁵ *King v. Merchant's Exchange Co.* 5 N. Y. (1 Seld.) 547.

⁶ Art. 1507.

par autre vie, or in fee, and also whether under section 30 they may not still in certain cases take "a definite term of years, absolute or determinable, or an estate of freehold expressly or by implication." But they cannot now take in England an undefined term of years, nor perhaps an estate *par autre vie*, with a power by implication, although Jarman¹ is of a different opinion.

Cases under this act will greatly aid the practitioner when construing a State statute of a similar nature. The English decisions, however, under the sections stated do not appear to be very numerous.

Questions relating to the estate taken by trustees or beneficiaries are all important in England, where a puisne incumbrancer can obtain priority over all preceeding mortgagees, chargeants, and encumbrancers, by taking an assignment of the legal estate, even with notice of the prior charges, provided he had not such notice when he first became a chargeant himself. This doctrine of tacking is founded on the equitable maxim that when the equities are equal the law will prevail. But this doctrine does not apply to States having general registries. For, registration is notice to all the world, and, therefore, in such countries possession of the legal estate is valueless as regards title. The legal estate is only of use when an ejectment or other proceedings at law are to be taken against a tenant who has not attorned to the plaintiff. If of two registered incumbrancers one has the legal estate, he alone at law is entitled to the possession. Yet, even if he has a beneficial charge or interest, which his legal interest was intended to support, he may be restrained by equity from recovering the possession at law. And where the trusts of a legal estate are satisfied, a registered instru-

¹ Vol. II. 230.

ment whether will or deed, conferring such legal estate is valueless, as the trustee will be restrained in equity from impeding the owner of a subsequent beneficial interest from recovering possession of the property. If the legal estate be long outstanding, it will be presumed to be assigned or released to the equitable owner, who can obtain at any time a decree for its surrender, if the trustee or his heir refuses to do so.¹

Meantime, a trustee will not be permitted to abuse his discretion,² and if he refuse to execute an existing trust, the court can appoint another to execute it.³ But if he acts *bona fide* in a trust wholly confided to his discretion, the court will not interfere.⁴ It is probable that, at the present day, any great degree of imprudence or negligence on the part of the trustee would be deemed by the court constructive evidence of *mala fides*, and would be checked accordingly.

An illegal secret trust may be proved by parol, and defeats the express gift.⁵ But an illegal trust, in an unattested paper or other illegal codicil, will not affect a gift in a prior will duly executed and fairly obtained.⁶ The illegality must be part of the *res gestæ*, and not subsequent thereto. Yet, of course, the subsequent conduct of the parties⁷ or the subsequent declaration of the testator is evidence of the illegality if it relates to such, and shows that it existed at the time of the

¹ See Story Eq. Jur. 998-1002, and notes; Sugd. Conc. View, 477.

² Prewett v. Land, 36 Miss. 495.

³ 20 Texas, 69.

⁴ Hawes Place Society v. Hawes Fund, 5 Cush. 454; Sharon v. Simons, 30 Vt. 458; but see Heard v. Sill, 26 Ga. 302.

⁵ See Sweeting v. Sweeting, 12 W. R. 239.

⁶ See Addlington v. Cann, 3 Atk. 152.

⁷ Trimmer v. Bayne, 7 Ves. 508, 518; Hester v. Hester, 4 Dev. 228; *contra*, Provis v. Rowe, 5 Bing. 435; see *supra*, Part I, notes to Proposition Seven, p. 250.

will. In other words, such subsequent declarations are admissions, and are, as such, evidence of the *res gestæ* in a question of fraud or other illegality.

The legal estate of a mortgagee or trustee will pass by a general devise of land,¹ even though the testator has other property to satisfy the gift, and though the devisee gets a power of appointment.² But mortgage or trust land will not pass by a general devise if it is subjected to the payment of debts, legacies, annuities or other charges, or is put in settlement, or subjected to executory limitations or a trust for sale.³ Yet it seems strange why the rule of rendering to each term only its own respective force—*reddendo singula singulis*—should not be applied in such cases, and the mortgage or trust estate be held to pass.⁴ The word “mortgage,” doubtless, ought to be held to pass both the legal and equitable interest in the mortgage land. But the phrase “securities for money” does not seem applicable to a legal estate in land.

Though a general devise of land will not, in England, carry the beneficial interest in a mortgage,⁵ (nor, *semble*, will a devise of the particular lands held in mortgage have this effect), yet, Jarman⁶ thinks that if the testator is in possession of the land, this is evidence that he intended the beneficial interest to pass. But it is doubtful whether parol evidence is admissible in such cases, as the ambiguity relates to the words of disposition.

Jarman thinks⁷ that if there is a bequest of all mortgages or securities, this does not affect the right of a devisee of a particular mortgage to the beneficial interest

¹ 4 Kent, 5th Ed. 538.

² *Ex parte Shaw*, 8 Sim. 159.

³ 2 Jarm. 645.

⁴ See *Jackson v. Delancy*, 13 Johns. 537.

⁵ See *Cogdell v. Cogdell*, 3 Desaus. 346.

⁶ 2 Jarm. 634; see, *supra*, 182–3.

⁷ Vol. II. 636.

therein, as the general bequest may contemplate future mortgages, but that if there was a specific bequest of the mortgage debt this presumption will not apply.

Where executors are to pay rents and profits to a devisee of the land, the executors take the legal estate by implication.¹ However, a legacy not residuary to an executor is conditional on his acting in the office;² and a debtor, too, when appointed executor, is still a trustee of his debt as assets for legatees, and even for next of kin.³ As to substituted executors, see *Smiley v. Bailey*⁴ and *Foster's case*.⁵

¹ *Vail v. Vail*, 4 Paige, 317; compare *Sterrick v. Dickinson*, 9 Barb 516.

² *Reed v. Devaynes*, 2 Cox. 285.

³ *Carey v. Goodinge*, 3 Br. C. C. 110.

⁴ 49 Barb. Sup. Ct. 80.

⁵ *English Law Rep.* 1872, C. L. 304.

CHAPTER XVI.

SURVIVORSHIP.¹

§ 1. *Rule in Ferguson v. Dunbar.*

If the phrase "dying without issue" has defeated many testamentary limitations and made the fortunes of many practitioners, subsequent clauses in the same will respecting a survivorship among the issue have had tenfold greater effect in the same direction. The word "survivor" is the most difficult of construction among all the terms which either legal acumen or lay eloquence can suggest. In addition to the express contingencies or conditions which are to determine what is a survivor within the definition referred to in the will, there is also superadded the additional danger of lapse, and the implied reference to the contingency of each of the intended survivors of a class also surviving the testator.

The questions respecting the meaning of the term "survivor" which have most puzzled the courts—and those difficulties are not yet finally settled by adjudication—may be divided into three leading classes.

The first point to be determined respecting the term is, whether it is itself to be construed literally or in the sense of "other." An example will best illustrate the nature of this difficulty. In *Ferguson v. Dunbar*,² a testator bequeathed a legacy to his wife, remainder to her three children, one-half to her son G., and one to her daughters E. and C., if living at the death of their mother, and if any of them should die in the life-time

¹ Part of this chapter was published by the author in *Alb. Law Journal*, vol. V. p. 130.

² 3 B. C. C. 468, note.

of their mother, leaving issue, the testator gave that share to the issue of such child or children equally, at the age of twenty-one years, or day of marriage; but if any of them should die before the age of twenty-one years, without issue, he gave that share to the survivors, and, if all of them should die without issue, the share was to fall into the residue. C. died, leaving children; E. afterwards died under twenty-one, and without issue. The question was, whether the children of C. were entitled to any part of the share of E. It was held that they were not. Lord Thurlow admitted that the testator intended that the children should take the shares which would have accrued to their parents while living, but as he had not said so in his will, but limited such shares to the survivors or survivor, the court should declare that G., as the only surviving child, was entitled to the whole of E.'s share.

This decision was followed by *Wilson v. Audrey*,¹ and especially by *Crowder v. Stone*,² which divided for a long time with *Ferguson v. Dunbar* the honor of being known as the leading cases on the doctrine now under consideration. In *Crowder v. Stone*, a testator bequeathed certain stocks to tenants for life, and, after their decease, to be equally divided between his nephew and four nieces, and in case of the death of his said nephew, or of any of his said nieces without lawful issue, before their respective parts should become payable, then the part of him or her so dying without issue, as aforesaid, was to go to the survivors or survivor, as tenants in common. At the decease of the last of the tenants for life, one niece only survived, but some of the deceased nieces left issue. Yet, Lord Lyndhurst decreed the whole fund to the survivor.

¹ 5 Ves. 565.

² 3 Russ. 217.

The case of *Crowder v. Stone* is not in principle in the least more strong or extreme than the case of *Ferguson v. Dunbar*. The former case only shows the extreme inconvenience and absurdity that may result from adopting the rule in *Ferguson v. Dunbar* invariably, and applying to wills in this special instance the same rules that prohibit the implication of cross remainders in deeds. The cases we are now considering are the more to be abhorred, inasmuch as cross remainders under other limitations are freely allowed in wills.

A bounty is held out for the loose drawing of wills, as these are supposed to be liberally construed by the courts; and yet the judges now and then halt at some magical phrase, such as "survivor," "heirs of the body," "issue," and refuse to take away one jot or tittle of the old law applicable to deeds.

Even a slight change in any rule of construction is certainly very dangerous to be adopted unless all the consequences of the innovation are carefully considered beforehand. For, what seems to be an innocent reform may work very great changes under new limitations. Yet an occasional alteration in a rule of testamentary construction is not as inconvenient as a change in a rule applicable to deeds, because certainty in the law does not and cannot insure good testamentary draughtmanship, which has largely been, from time immemorial, a perquisite of the village schoolmaster. Indeed, certainty in the law and rules of construction eliminates judicial discretion, and this is not one of the least valuable results of a certain jurisprudence. But adherence to fixed rule, as regards testamentary construction, ought to be restricted to received interpretations of common phrases, and not to a perpetuation of the technical meaning of technical terms such as "survivor," "heirs of the body," &c.

The rule in *Ferguson v. Dunbar* has lately been much shaken in England, and though it appears to be still unbroken in the United States,¹ yet it is evidently doomed. In *Cole v. Sewell*,² the doctrine in *Crowder v. Stone* was attacked by Lord St. Leonards; and that case, with its special surroundings, has fallen recently beneath the judicial axe in *Marriott v. Abel*.³ At present, if there is any collateral condition or contingency affecting the gift to the survivors, except the implied condition of their survivorship, the rule in *Ferguson v. Dunbar* will not apply. If, for instance, the testator expressly refers not merely to one of the legatees dying in the lifetime of the other, but of one of them *dying childless*, or without issue, in the sense of children, the word "survivor" will be construed "other," and children such as those excluded in *Ferguson v. Dunbar* and *Crowder v. Stone* will take.

Jarman, however,⁴ thinks "the authorities seem now to present an insuperable obstacle to the adoption of any change in the rule where the context is silent as to other contingencies than that of survivorship alone." But, the recent case of *Marriott v. Abel* shows that Jarman's apprehensions were not well founded. As the old rule is thus so completely wrecked in England, there is an *a fortiori* ground for expecting that it will not in future be applied in the United States, especially when the context affords any aid to a liberal construction of the term "survivor."

It is hard to see how the doctrine in *Crowder v. Stone* can be maintained without endangering all the established rules for implying cross-remainders and

¹ See 2 Redfield on Wills, p. 371, *et seq.*

² 2 Con. and Laws, 344, Irish.

³ L. Rep. 7 Eq. 478.

⁴ Vol. II. 617.

other interests in wills. From the observations of Lord St. Leonard, in *Cole v. Sewell*,¹ and the case of *Slade v. Parr*,² the old rules certainly appear to rest at present on a slender and timeworn foundation.

In the American States, indeed, hitherto the term survivor, when unaffected by the context, has received its proper acceptation only, and has not been interpreted "other."³ Yet, even in a deed, cross-remainders in tail to surviving children have been held, even in England, to give an interest to the issue of a deceased child, as the estate was not to go over, unless the issue of all the children failed.⁴

However, if the bequest be to A. for life, and after his decease to B., C. & D., or the survivors, those living at the death of A. alone will take.⁵

Even if the word survivor is used elsewhere in the will as synonymous with "other," yet the rule in *Ferguson v. Dunbar* may still prevail.⁶ Survivor, too, will be construed other, more readily where the limitation over is on the decease of any of the prior objects, combined with some collateral event, especially if this relates to the issue.⁷ The alleged reason of the distinction is that the limitation over is not wholly interwoven with the point of survivorship. But, if the contingency is confined to the donees themselves, such as their not leaving issue, and not as in *Aiton v. Brooks*, relating to the issue, the rule in *Ferguson v. Dunbar*, and *Leeming v. Sherrat*,⁸ will apply.

¹ 2 Conn. & Laws, 344.

² 7 Jur. 102.

³ *Moore v. Lyons*, 25 Wend. 119; see *Fowler v. Depau*, 26 Barb. 224; *Norris v. Beyea*, 13 N. Y. (3 Kern.) 273.

⁴ *Doe v. Wainwright*, 5 Durn. & East, 427.

⁵ *Hearn v. Baker*, 2 K. & J. 383; see *Doe v. Townsend*, 1 Houst. 365.

⁶ See *Leeming v. Sherrat*, 2 Hare, 14.

⁷ *Aiton v. Brooks*, 7 Sim. 204.

⁸ 2 Hare, 14.

But, as the ruling in the cases mentioned pre-eminently defeats the intention of testators, the courts will be astute in discovering in the context some loophole for escape. The contingencies on which the limitation to the survivors depends, are however, usually the only pivots whereon the beneficent intentions of the Judges can turn.¹ For instances, where the term "survivor" may be construed other, see *Cole v. Sewell*.²

The distinction taken in *Aiton v. Brooks*, between the event of one of the donees dying in the life-time of the other, and that of dying childless contains, as Jarman observes, much good sense.³ This distinction, indeed, is one which is present to the mind of every testator who dictates any similar limitation, only that he may not express his intention with sufficient point to meet the very technical rule of construction established by *Ferguson v. Dunbar*.⁴

Where the word survivors is used merely with reference to a class, to denote the duration of an estate, and does not intrinsically impose a fresh condition of survivorship, those who die before the end of the term may have vested and transmissible interests.⁵

The incident of survivorship is abolished by the Act of 31 March, 1862, in Pennsylvania, in cases where there is a devise to two or more by name, unless the testator shows a plain intention to vest the estate in the survivor.⁶

¹ See *Leeming v. Sherratt*, 2 Hare, 14.

² 2 H. L. C. 186; *Smith v. Osborne*, 6 H. L. C. 375.

³ 2 Jarm. 617.

⁴ 3 Br. C. C. 468.

⁵ *Bryan v. Twigg*, Law Rep. 3 Ch. App. 183.

⁶ *Kennedy's App.* 60 Pa. St. 311.

§ 2. *Survivorship—Accrued interests.*

If a testator gives a sum of money to four as tenants in common, and declares that if any die under twenty-one or before marriage it shall survive to the others, if one dies, his share survives to the other three, but if a second dies, the other two will take only the second's original share, and not the one he got by accruer on the death of the first.¹ Let the sum be \$1,200, and the parties be designated as A., B., C. and D. Each takes \$300. On A.'s death, B., C. and D. get each \$100. But, on B.'s death, C. and D. get only \$150 each, and not \$200, though A. gains altogether \$400 under the will. A concrete example always best explains an abstract rule. The doctrine in question is known as the rule that a gift to survivors in a class does not carry shares accrued already to the members as survivors, but only their original shares; in other words, a limitation to survivors does not operate on shares already accrued to members of the class of donees under the gift to which the survivorship of the donees relates. This doctrine is founded on the general disinclination of the courts to divest estates. If some of the donees die in the testator's lifetime, Mr. Hawkins² considers that their shares will go to the survivors. This will probably be the case if the donees constitute a class, though the shares are in common, and not joint.³

The doctrine in *ex parte* West would, perhaps, not be adopted in America in similar cases.⁴ There is, indeed, no doubt that a testator intends by a gift over

¹ See *Lawrence v. McArter*, 10 Ohio, 37; *ex parte* West, 1 Bro. C. C. 575; *Pain v. Benson*, 3 Atk. 80; *Crowder v. Stone*, 3 Russ. 217; but see *Marriott v. Abell*, L. R. 7 Eq. 478.

² P. 269.

³ *Barker v. Giles*, 3 Bro. P. C. Toml. 104.

⁴ See 2 Redfield, 373, note 3.

to survivors to pass accrued as well as original shares of the donees who die previously.

Yet in England even the word "share," "portion" or "part" will not carry the accrued interest. It will be suffered to lapse rather than to pass under the terms¹ mentioned. The phrase "share and interest," however, may have this effect.² But, of course, if the testator pleases, he can make the accrued shares devolve on the ultimate survivor, either by express direction or by using phraseology that will necessarily raise that implication. If his intention, as declared in the will, be that the entire property shall pass in one mass to the ultimate survivors, this will imply a survivorship as to the accrued shares,³ especially if there is a gift over.⁴ Jarman thinks⁵ that, under a gift over, in case all the legatees die without issue, "all" would not be construed "any."⁶ But, as "survivor" is sometimes construed "other," so, *pari ratione*, "all" may be construed "any" in the cases referred to.

The phrases "benefit of survivorship," "in the manner aforesaid," directed regarding the original shares, will pass the accrued shares. For a curious illustration of the effect of the rule in *ex parte* West, see *Eyre v. Marsden*.⁷ It seems only to apply to limitations to survivors, and not to alternative limitations to the children of the donees.

If direct or original shares are given for life, and accrued shares indefinitely, these will not be cut down in meaning by analogy to the primary interests, although

¹ *Rickett v. Gillerward*, 6 Jur. 818.

² *Douglas v. Andrews*, 14 B. 347.

³ 2 Jarm. 622.

⁴ *Doe v. Berkhead*, 4 Exch. 110.

⁵ Vol. II, 626, 4th Am. Ed.

⁶ See, *contra*, *Douglas v. Andrews*, *ut sup*; *Worlidge v. Churchill*, 3 Bro. C. C. 465.

⁷ 4 My. & Cr. 231.

such is probably the intention of the testator. The cases cited by Jarman,¹ however, rather prove the contrary of his position. But, where there are various restrictions on the primary shares, and not merely a limitation of interest, as for a life, and the restrictions are not repeated on an express gift by the testator of the accruing shares, it seems to be settled that the restrictions will not be extended to such shares by implication: nor, *semble*, if the original shares vary in amount, will the accruing ones be distributed in the same proportion, unless otherwise the accrued shares would be void for remoteness, or would, in some way, be inconsistent with the testator's primary intentions.²

§ 3. *Period for ascertaining survivorship.*

A third question, connected with a limitation to survivors of a class, or several donees, relates to the period when the survivorship is to be determined, or to the inquiry whether the reference is indefinite in point of time. Under a tenancy in common, with an express limitation to the survivors, none of the tenants in common can defeat the gift to the survivors. Under a joint tenancy, the legal right of accruer is of no value, inasmuch as any of the joint tenants may still alien his share, and defeat the right of accruer.

If the donees take an interest vested in possession on the testator's decease, the survivorship clause is deemed to have been inserted to provide against the death of any of the donees in the testator's lifetime, and to refer to the date of the testator's decease.³ But, where there

¹ Vol. II, 624.

² *Georges v. Georges*, *Hayes' Inquiry*, 52; *Gibbons v. Langdon*, 6 Sim. 260.

³ See *Passmore's Appeal*, 23 Penn. St. 381.

is a preceding life interest, the question is more difficult. Owing to an impression that indefinite survivorship was inconsistent with a tenancy in common, the death of the testator was the period to which the early adjudications on the point referred the survivorship.¹

Under a gift to A. for life, and in case B. die without issue, remainder to two or more, and the survivors or survivor, as tenants in common, the survivorship may be construed in four different ways. It may mean that the donees who survive the testator should take vested interests, or that those only who survived both the tenant for life and the testator should take, or that they should survive both these periods, and also that of the contingency referred to; or the clause of survivorship may be construed as indefinite, and giving the whole interest to the final survivor. A gift over on the decease of the survivor will impart this last meaning. With the exception of limitations of the last description, there is little ground for doubting that the period of the testator's death, and not that of the tenant for life, is the natural date for a vesting in possession of a gift to survivors, and that when an express contingency or condition is also limited, those who survive the contingency and the testator ought to be deemed to take. Jarman opposes this view with his usual learning and affiliation of cases. But these are hardly, perhaps, as strong as he deems them, while they do not apply to devises of land. Such gifts are, in the main, construed as vesting at the testator's death.

When the gift was to the donees as tenant in common, the judges considered that the clause of survivorship was to prevent lapse, and, therefore, necessarily pointed to the date of the testator's death, and not to

¹ See *Moore v. Lyons*, 25 Wend. 119.

that of the tenant for life. The difference between the two renderings is that survivors taking at the death of the testator, and dying during the life of the particular tenant, transmit their shares to their heirs or next of kin according to the nature of the property, but if the survivorship relates to the death of the tenant for life, those donees only who are then living take vested and transmissible interests. Exceptions to the early rule on this point, as far as regards bequests of personalty, were soon founded on the fact that the testator referred to the donees by name, or to the survivor (in the singular), or, that the interest was of a deferred nature. Finally, it has become firmly settled in England, that, as regards bequests of personalty, the period of survivorship is that of distribution and relates to the death of the tenant for life.¹

The old rule, however, though cavilled at, still remains unbroken as regards devises of realty.² Jarman³ greatly bemoans this divergence from the rule that regulates similar dispositions of personalty.⁴ But with all respect to that very learned commentator, the intention of a testator appears to be better effectuated by giving a little to many, rather than a large deferred and contingent interest to a few. "To him that hath shall be given," is not by any means a motto likely to be present to the mind of a testator when about distributing his means amongst his family.

Some writers now think that the change of the law, as indicated by the cases on personalty, renders it uncertain whether the rule as to bequests may not in

¹ *Cripps v. Woolcott*, 4 Madd. 11; see *Den. v. Sayre*, 2 Penn. 598; *Blewitt v. Stanfords*, 9 L. J. N. S. Ch. 209.

² *Edwards v. Symonds*, 6 Taunt. 213.

³ 2 Jarman, 463; see *Haddelsley v. Adams*, 22 B. 271.

⁴ See *Buckle v. Fawcett*, 4 Hare, 536.

future be extended to devisees. But these appear to be protected from such a calamity by the general rules which favor the early vesting of estates.¹ Mr. Hawkins considers² that the "true rule, perhaps, is, that survivorship's *prima facie* refers to the point of time mentioned in the gift in nearest juxtaposition with the words." If no other clue to the intention of the testator is available, no doubt the suggestion of Mr. Hawkins ought to be acted on. But in a will grammatical construction is rarely important, owing to the special wording of ill-drawn instruments under which alone questions of difficulty can now arise, testamentary law being in the main so well settled by cases.³

With respect to this point, substitutional bequests are to be distinguished from cases such as *Barker v. Giles*,⁴ where, under a devise to A. & B., and the survivors of them, their heirs and assigns as tenants in common, A. & B. were held to be joint tenants for life with several remainders in fee. The words of severance here are not necessarily applied to the estates for life. Therefore, the usual legal presumption in favor of a joint tenancy so far prevails. Besides, the words of division and severance are thus sought to be reconciled with a gift to the survivor. Yet, this construction may occasion a lapse of a moiety of the inheritance which would otherwise vest in A. or B. surviving the testator. The doctrine in *Barker v. Giles*, seems equally applicable in principle to similar bequests of personalty, and would probably be followed in the American courts.

If the gift to survivors is to take place on a contingency, as if any of the donees, or if another, or if the ten-

¹ Jarm. Vol. II, 750.

² P. 266.

³ See *Littlejohn v. Household*, 21 B. 29.

⁴ 3 Bro. P. C. Toml. 104; see *Doe d. Littlewood v. Green*, 4 M. & W. 229.

ant for life die without issue, Jarman considers¹ this strengthens the argument for a reference to the time of the death of the tenant for life, inasmuch as a contingent limitation to survivors is clearly consistent with a tenancy in common. But the argument in favor of computing survivors at the time of the testator's death is not wholly founded upon the incidents of a tenancy in common as distinguished from a joint-tenancy, but upon the leaning of the courts to deem interests vested, especially as regards real estate.

In *Carver v. Burgess*,² the bequest to the survivors was on a contingency, and it was held that the period of distribution related to the happening of the contingency; but there was no preceding life estate. The case is thus only in conformity with the general rule, which makes the vesting of a legacy to survivors depend on the period of distribution.³ In accordance with this rule, under a bequest to A. for life, and after his death to his surviving children, if A. dies in the lifetime of the testator, the date not of A.'s, but of the testator's death is the time for computing the survivorship, as that is the period of distribution.

The question, however, even in such cases, does not necessarily appear to be whether the survivorship is indefinite, or relates to the death of the tenant for life. For, though the contingency shows that the testator did not mean merely to guard against a lapse, yet, on the other hand, it does not imply that he did not also intend to guard against that contingency, and yet not to expose the gift to a special risk. Certainly, if it is open to one danger, there is only the more reason for presum-

¹ 2 Jarm. 650; *Huffan v. Hubbard*, 16 B., 579; *Daniell v. Daniell*, 6 Ves. 297.

² 7 D. M. G. 96.

³ *Cripps v. Woolcott*, 4 Madd. 15.

ing that the testator did not mean to render it liable to others. The argument founded on the contingency appears not to be of much value either way.¹

In *Roe d. Sheers v. Jeffrey*,² indeed, it appears to have been conceded that where one of the donees survived the testator, and only died after the contingency happened, but during the life of the particular tenant, he did not take under the limitation to survivors. But neither this case, nor the opposite one of *Doe d. Lifford v. Sparrow*,³ is any real authority on the point, as these cases were decided upon special grounds. The next case cited by Jarman—that of *Weeden v. Fell*⁴—is distinctly against his view. That case was one of personalty, while the other two decisions just referred to were cases of devises. *Weeden v. Fell* is, therefore, an *a fortiori* authority as regards similar limitations of realty.

The case of *Weeden v. Fell*⁵ indicates that where there is a special contingency or condition imposed, survivorship will, as a rule, refer to the period of the contingency. Does not this exclusion of regard for the decease of the tenant for life show that the date of the testator's death is the natural period for computing survivorship, when no contingency is in question?

If several contingencies or conditions are imposed, some of which are not personal to the legatees, these latter conditions will not prevent a vesting, although they may operate to divest the interest afterwards.⁶ Mr. Hawkins justly observes that contingent provisions for children may not, owing to the general ten-

¹ See *White v. Baker*, 2 De G. F. & J. 55.

² 7 D. & E. 589.

³ 13 East, 359.

⁴ 2 Atk. 123; *Dickenson v. Jordan*, 1 Murph. 388.

⁵ 2 Atk. 123.

⁶ *Crozier v. Fisher*, 4 Russ. 398.

dencies of the courts, be construed to be subject to the additional contingency of the children surviving the testator.¹ This reason is sound, and applies, though in a less forcible form, to all similar limitations.

If there is a limitation over after the death of the survivor, this points, of course, to an indefinite survivorship.²

The word "survivor" has thus produced a very abundant crop of litigation. The net results of the cases appear to be, first, that the term will be construed literally, and not as other, and that any of the donees not surviving the appointed period takes, as survivor, no vested and transmissible interest; secondly, a limitation to survivors does not carry shares previously accrued under the operation of the same clause; thirdly, a gift to the survivors, *simpliciter*, of a number of tenants in common, refers to the donees surviving the testator. But, where there is a precedent life interest, and the subject is personalty, the "survivors" take no vested interest or are not ascertained until the period of distribution, that is to say, at the time of the decease of the tenant for life.

The limitations considered in this chapter are probably not of frequent occurrence in American wills. But, as our settlements of property become more complicated, there is no doubt that testators will likewise be equally provident in respect to remote contingencies. Even at present the doctrines relating to survivorship have been illustrated by some American decisions. However, although, doubtless, the value of the English rules will be taken into account in future adjudications upon these questions, yet there is equally

¹ *Berry v. Briant*, 2 Dr. & Sm. 1.

² *Doe d. Borwell v. Abey*, 1 M. & Selw. 428.

strong ground for considering that the technical rules established in *Ferguson v. Dunbar*,¹ *ex parte West*,² and *Brograve v. Winder*³ (although the latter decision is highly approved by Jarman), would, if at all followed here, be, at all events, confined within the strictest possible bounds. It has, indeed, been already frequently decided in the American courts, that survivors may mean others, and not actual survivors,⁴ even though the survivors do not take the accrued share which a deceased member of the class took by lapse, but only the original shares of the bequest.⁵ See further as to the construction of the term "survivor" in the New York courts, *Cushney v. Henry*.⁶

§ 4. *Limitations dependent upon decease.*

If the testator does not leave the period of survivorship uncertain, as in the cases last considered, but limits the interest over in the event of the donee, or one of the donees, dying before a certain contingency happens, and if a donee subject to such contingency dies in the lifetime of the testator, there is no lapse, but the gift over in the first case, or to the other members of the class in the second, will operate. Thus, for instance, where there is a gift to A., but if he die under age to B., and A. dies in the lifetime of the testator, the remainder to B. takes effect as a simple

¹ 3 B. C. C. 468 n.

² 1 B. C. C. 575.

³ 2 Ves. Jun. 634.

⁴ *Carter v. Bloodgood*, 3 Sandf. Ch. 293.

⁵ *Norris v. Beyea*, 13 N. Y. (3 Kern.) 273; see *Fowler v. Depau*, 26 Barb. 224; *Pirnie v. Purdy*, 10 Barb. 60.

⁶ 4 Paige, 345; *Dominick v. Moore*, 2 Bradf. 201; *Goodall v. McLean*, 2 Bradf. 306; *Clark v. Clark*, 3 Bradf. 32.

absolute gift on the testator's decease.¹ There is no lapse. Even where the gift is to a class, such as children who cannot be ascertained until the death of the testator, yet if one dies before that period, although he never was an actual donee, his share will go to the surviving children.

But, where the donees in the clause in question are the executors of the deceased legatee, the word "executors" merely indicates that the interest is vested on the testator's decease, and prior to the period of distribution, and the executors will not be deemed to take by substitute in case of lapse. The ground of this somewhat strange doctrine appears to be the presumption that a testator believes the objects of his bounty will survive him.² This is a most violent presumption, where he almost expressly provides for the contingency of lapse.

A bequest to the next of kin of a married woman, in case she die, her husband living, is held to apply only to the contingency specified, and not to a lapse.³ This is a comparatively reasonable rule. *Expressio unius, &c.* As regards the issue of a deceased child, however, the courts will strain at any expression that may admit such issue to a participation in a general family settlement.

¹ Darrel v. Molesworth, 2 Vern. 378.

² Corbyn v. French, 4 Ves. 418; see Fisher v. Hill, 7 Mass. 86; Princes Dig. 256; Nelson v. Moore, 1 Ired. Eq. 31.

³ Baker v. Hanbury, 3 Russ. 340.

CHAPTER XVII.

§ 1. *Nature and incidents of powers.*

Powers are either appendant, collateral, or simply collateral, according as the donee of the power—or, as he is sometimes termed, the appointor—has an interest; 1, in the particular property to be appointed; or, 2, in another part of the same property; or, 3, has no interest of any kind in it. Powers of the first kind are suspended by any grant or change by the donee on his interest. For, it would be inequitable to allow a person under a power to defeat his own grant. If, therefore, he assigns away his whole interest, his power is completely extinguished, and, if he makes a partial disposition of it, his power is so far suspended; or, rather, he may still execute his power at once, but the appointments so made by him will be *puisne* in order of priority to his own grants or changes, so far as his interest extends. So far as his interest does not extend, the appointment will operate from the date of the primary deed conferring the power, and not from the date of the deed executing it.¹ A power may thus be appendant as regards one limitation and collateral as regards another limitation in the same settlement.²

The peculiar value of a power, therefore, is that it operates from the date of the primary deed. It also overrides all other limitations in that deed, unless so far as the power is appendant, and has been indirectly sus-

¹ *Noel v. Lord Henley*, 1 McClell. & Y. 52.

² See Sugden on Powers, p. 3, *et seq.*

pended by some grant or change by the donee on his own interest in the subject matter of the power. Powers appendant may be thus impliedly suspended. They may also be suspended expressly by a covenant to that effect. Powers collateral are, in their nature, incapable of indirect suspension, but may be suspended or extinguished by express contract. Powers simply collateral are considered to be incapable of suspension even by express contract.¹

In the absence of satisfactory judicial decisions on these points, it would seem that neither of the two latter classes of powers can be suspended, much less extinguished, if they are trust powers, but that, on the other hand, if they are merely discretionary, there is some reason to contend that they may be voluntarily extinguished by the donee. Yet, it seems inequitable to allow even a donee of a bare discretionary power to abdicate his functions. He is a trustee of his discretion. These remarks are suggested with great diffidence on points which have been elucidated to some extent otherwise by so distinguished a judge and author as Lord St. Leonards. However, the courts will not interfere with a *bona fide* exercise of discretion by the donee of a power, even when it is a trust power.² As to discretionary powers, see, further, *Forman v. Whitney*.³

A general power is never a trust power. A special power may or may not be in trust. Both kinds of powers may be contained in wills, and, *semble*, in any kind of deed also, although Lord St. Leonards considers that special powers cannot be reserved in deeds operating by way of use and not at common law.⁴

¹ 1 Sugden on Powers, c. 1, 2.

² *Portsmouth v. Shackford*, 46 N. H. (Hadley) 423.

³ 2 Keyes, 165; *Bundy v. Bundy*, 38 N. Y. 410.

⁴ See this question discussed by the author in a review of Sugden on Powers in *LAW MAG. and REVIEW*. London. May. 1862.

In *Learned v. Tallmadge*,¹ a devisee of a power executed it, notwithstanding that he had previously covenanted by deed not to do so. The covenant was held to be inoperative, as the power was deemed to be simply collateral. But, as the husband took a contingent estate, besides the power, this was not a power simply collateral. The decision, however, can be supported on principle, inasmuch as the power was a trust.

The order of priority of various powers comprised in the same instrument will be determined by the justice and reason of the matter, and the probable necessity for executing them at an early or late date, according to their nature. Therefore, a power to jointure overrides a power to portion, because a wife's claims are prior to those of children, who may never require portions. Powers of leasing appear to be still more urgent, inasmuch as they relate to the management of the estate, without proper attention to which there might be no adequate property to appoint at all. On these points, see the distinguished work already cited, and also the very copious treatise of Mr. Chance.

A general devise will not operate as an execution of a power if the gift may be otherwise operative,² unless where a local statute provides to the contrary. Where a married woman makes a will of realty, which would be void except as an appointment, it will be construed as such.³ So, a devise of lands in A. and B. will operate as an execution of a power over lands in B., though testator has lands in A.,⁴ if he have none in B.

A general bequest of personalty does not operate as an execution of a power, because, as it takes effect in

¹ 26 Barb. 443.

² *Blagge v. Miles*, 1 Story C. C. 426, 445.

³ *Berger v. Berger*, 1 Hoff. 2.

⁴ *Napier v. Napier*, 1 Sim. 28.

every State only from the death of the testator, he may have personal property then to satisfy the gift.¹ And this rule applies to wills of married women, inasmuch as they may have separate estate.

All powers conferred on the testator after the date of the will are now executed by a general devise in all those States where devises speak from the death of the testator, if the powers would under the old law have been executed if they had existed at the date of the will, and if they are not mere powers of revocation contained in deeds executing powers.²

In *Wilson v. Bell*³ a testator bequeathed all his personalty to his son T., and devised his real estate to T. for life, with remainder over, and appointed T. his executor. The will contained the following clause: "And I direct that my said daughter A. B. shall reside with and be maintained by my said son so long as she shall remain single and unmarried." The English Court of Appeal in Chancery held (reversing the decision of Vice Chancellor James), that A. B. had no claim on the executors of T., but that the trust was imperative, if A. B. was willing to reside with T. during his life; in other words, that the maintenance of A. B. was conditioned upon her willingness to reside with T., and that this trust on T. ended with his life.

A power to the executors to sell real and personal property does not pass to them any estate, or break the descent, and the land (if any), passes at once to the devisees, or else to the testator's heir, subject only to the

¹ *Andrews v. Emmot*, 2 B. C. C. 297.

² *Palmer v. Newell*, 20 Beav. 38.

³ Law Rep. 4. Ct. App. 581; 17 W. R. 944.

execution of the power.¹ But a devise of land to executors to sell gives them the fee.²

A devise to sell, being a mere power, does not break the descent, even where the donee of the power is residuary devisee.³ So, where the executors were appointed trustees of minor beneficiaries, and authorized to sell, it was held that they took only a power.⁴ Giving legacies, and directing the executors to appraise the real estate and increase or diminish the legacies, according to the surplus after paying debts, has also been held not to amount to a devise of the real estate.⁵

Where executors are directed to apply the proceeds, or to invest a share and pay over the interest, they take a power of sale by implication.⁶

A direction to pay interest implies a power to invest⁷ and a power to "dispose of" land, implies a power to lease,⁸ where the remainder men are minors.

Although a direction in a will that land is to be sold for payment of testator's debts gives the executors a power of sale by implication,⁹ yet, under a devise of lands to several, to be equally divided between them "by sale or otherwise, as may be deemed best," the executor has no implied power to sell.¹⁰

¹ *Scott v. Morell*, 5 N. Y. Surr. (1 Redf.) 431, 3 Rev. Stat. 5 ed. 20, 21. §§ 75, 77; *Mapes v. Tyler*, 43 Barb. 421; 2 Rev. Stat. 3 ed. 14, § 56; 3 Cow. 651; 7 Wend. 47; *Matter of McLaughlin*, 2 Bradf. 107.

² *Peck v. Henderson*, 7 Yerg. 18; *Greenough v. Wells*, 10 Cush. 571, 577.

³ *Germond v. Jones*, 2 Hill, 659.

⁴ *Fowler v. Depau*, 26 Barb. 224.

⁵ *Jackson v. Burr*, 9 Johns. 104.

⁶ 4 Kent. Com. 319; *Dorland v. Dorland*, 2 Barb. 63; *Bogert v. Hertell*, 4 Hill, 492.

⁷ *Ackerman v. Emott*, 4 Barb. 626.

⁸ *Hedges v. Riker*, 5 Johns. Ch. 163.

⁹ *Peter v. Beverley*, 10 Pet. 533; *S. P. Taylor v. Benham*, 5 How. 233.

¹⁰ *Dunlap v. Pyle*, 5 McLean, 322.

A trust for "maintenance" will not usually authorize a sale.¹

A direction to raise a certain gross sum out of rents and profits is latterly held to authorize a sale, unless the testator refers to a mode of enjoying the property inconsistent with a sale, or otherwise shows an intention not to have the land sold, but that the charge should be raised only out of the annual rents.²

A power of sale in New York, given to three executors, is well exercised by one only, he alone having acted under the will.³ But a power to sell with consent of A. fails on the death of A. without having consented to, even though he did not dissent from, the execution of the power.⁴

Where a power is to be exercised, after certain conditions are fulfilled, it cannot be executed prior to such fulfilment.⁵ As to the time when a power may be exercised, where it is qualified by certain previous trusts,⁶ see *Matter of Vandervoort*.

As to the time when a trust power to sell can be exercised, see *Egerton v. Conklin*.⁷

§ 2. *Precatory Trusts.*

All difficulties of construction—whether it be a will or a deed that is the subject of interpretation—arise either from the words of grant being indistinct or else from an indefiniteness in the subject-matter or the object of the gift. In the case of a deed, a question rarely

¹ *Kingsland v. Betts*, 1 Edw. 596.

² *Wilson v. Halliley*, 1 Russ. & My. 590; *Bootle v. Blundell*, 1 Mer. 232.

³ *Taylor v. Morris*, 1 Comst. 341.

⁴ *Barber v. Cary*, 1 Kern. 397.

⁵ *Minot v. Prescott*, 14 Mass. 496.

⁶ 7 N. Y. Leg. Obs. 25.

⁷ 25 Wend. 224; see also *Bradhurst v. Bradhurst*, 1 Paige, 331.

arises whether the grantor intended to convey or not. He never uses any of the words "desire," "wish," or "will," but employs terms of present operation, as, for instance, "I give, grant, bargain and sell, stand seized of, enfeoff, convey, assign," &c. There is no ambiguity in such terms of present grant. But, in the case of a will, the draftsman often uses merely recommendatory expressions, as to which it is very hard to discover the sense in which they were most probably used by the testator. If he makes a gift directly to A., the question, indeed, is rarely entangled in any difficulty. But, when he devises or bequeaths to A., "wishing," "willing," "hoping," "trusting," or "not doubting," that A. will either immediately or at his death convey the same to B., the question arises, whether, in default of any appointment by A. to B., the latter, nevertheless, has the power executed to him by the construction which the court gives to the will.

Imperative powers of this kind are usually termed precatory trusts, or trusts by implication in default of appointment. The only distinction between the form of a limitation of a precatory trust and a trust by implication in default of appointment is, that an interest is conveyed to the donee of the power in the former case, but not in the latter. For instance, the phrase "I hope A. will appoint a sum of \$10,000 amongst B.'s children, and charge the same properly on the lands devised to B.," is an example of a precatory trust. But it would be a trust by implication to the children of B., in default of appointment by A., if the phrase ran, "I give unto A. the sum of \$10,000, now possessed by me in the public stocks, not doubting that he will convey the same at some time to the children of B." The legal incidents of these two kinds of limitation are, as regards the children of B., exactly the same.

They are not always so, however, as regards A., the trustee.

A leading case in the law of precatory trusts is *Harding v. Glyn*.¹ The rule as deducible from that case and from *Brown v. Higgs*² may be summarized as follows: A power to appoint is construed a trust in default of complete appointment, where the direction to appoint is imperative, and the subject-matter and objects of the power can be distinctly defined.

The law of precatory trusts, however, has undergone some changes in England within the last thirty years. It is also somewhat different in the United States from what prevails in the United Kingdom, while some of the States differ from others on the matter. We will, therefore, briefly sketch these differences in the present section, and illustrate our views by reference to a few leading cases. Questions of precatory trusts, on account of the diversities mentioned, elucidate, with singular distinctness of outline, most of the questions that arise on the construction of wills. For, these disputes always relate either to the meaning of the terms in which the gift is made, or else to its subject-matter or object.

The law of England has not undergone any appreciable change as to the nature of the terms by which alone a precatory power can be conferred. The cases have varied mainly as to the other two points mentioned, viz.: the certainty of the description of the subject or of the object of the gift. But, though the law has been uniform in requiring expressions of an imperative nature, yet the courts did not adopt the rules of construction applicable to similar limitations in deeds, but decided that various words and phases, not at all denoting a mandate in their primary or grammatical

¹ 2 White & Tud. Lead. Cas. 2d ed. 184; 1 Atk. 470.

² 4 Ves. 708.

sense, were, nevertheless, really imperative when found in wills.

In the early American cases on this question, the English latitude of construction was allowed, and any expression of recommendation by the testator that A. should give an interest to B., was regarded by the courts here as a trust for B., which he took, no matter whether A. acted or not on the discretion given him by the testator.¹

But a change is alleged to have come over the spirit of the judicial dream. Our courts now, sometimes, will not, with all their old readiness, construe every expression of desire as imperative. Jarman² and Redfield on Wills³ approve of this innovation, as effectuating the testator's intention better than the old latitude of construing as imperative trusts mere limitations that implied a discretion in the donee to use or not, as he pleased, the power conferred on him by the testator. We cannot agree with those authorities on this point. A testator recommends, instead of commanding, simply because he does not wish to give offense to the donee of the power, and also because he believes that the courts will carry out any wish of his declared in a will. Let us take the case of a person dying, and leaving after him a young widow and family. He will not show any want of confidence in her, because he knows that his children will be still more or less in her power. Now, almost all the cases where mere recommendations in wills have been construed trusts are instances of the kind mentioned. Truly, the courts acted most prudently in thus construing mere expressions of desire. But, it is said that no one would use such mild terms, unless he wished the trustee to have a discretion. No

¹ See *Collins v. Carlisle*, 7 B. Monr. 14; *Bull v. Bull*, 8 Conn. 47; *Prewett v. Land*, 36 Miss. 495; *Gamble v. Dabney*, 20 Texas, 69.

² Vol. I, 338.

³ Vol. II, p. 423.

testator, however, will refer at all in his will to any matter that he had not at heart. We think, therefore, the courts will act wisely in following, as much as possible, the good old rule, and turning the donee of a power into a trustee, except when the testator has plainly meant that the donee should have a discretion either to serve as a check upon the conduct of the beneficiary, or for some other reasonable motive.

The leading case upon the supposed American rule, which is not to consider a mere recommendation imperative, is *Gilbert v. Chapin*.¹ It was held in that case, that a devise to testator's widow and her heirs forever, "recommending" her to give the same to testator's children, created a fee simple in the widow and no interest in the children of the testator. This decision, however, has fortunately not been followed in the very similar case of *Warren v. Bates*.² The words in the latter case were, "in the full confidence," &c. And in *Reed v. Reed*,³ under a "wish" that the testator's son should give his grandson the gift bequeathed, the son was held to be constituted a trustee for the grandson.

It is stated in *Redfield on Wills*,⁴ that in some late cases in England the courts have exhibited an inclination to adopt the principle of *Gilbert v. Chapin*, and to treat recommendatory expressions in a will as dependent for their full force on the discretion of the donee of the power.⁵

On the whole, the question whether the old English rules on the question in *Gilbert v. Chapin* is to prevail may be considered as still *sub judice*, even in America. No doubt some mere suggestions by testators have been

¹ 19 Conn. 342.

² 98 Mass. 274.

³ 30 Ind. 313.

⁴ Vol. II, p. 425.

⁵ See *McCulloch v. McCulloch*, 11 Weekly Rep. 504; *Graves v. Graves*, 13 Irish C. 182; *Godfrey v. Godfrey*, 11 Weekly Rep. 554; *Scott v. Key*, 11 Jur. (N. S.) § 19; and *Hood v. Oglander*, 12 L. T. (N. S.) 626.

construed in England as imperative, although such seems not to have been the real intent of the testator. Still, a tendency is this direction is, we think, better than the rule in *Gilbert v. Chapin*.

If the question was not so mapped out by the decisions the natural rule would be for the courts to regard those cases where a testator is providing for his children, through the intervention of a trustee, as stronger than ordinary delegations of a power to a stranger for the benefit of strangers. Moral considerations require that a parent's dying wish, desire, or recommendation should be held as sacred as his most positive precept. Unfortunately, however, moral obligations have strained the doctrine in the contrary direction.

This question of precatory trusts elucidates very well the general rules for interpreting wills, and shows some strong instances where the primary meaning of terms has been controlled either by the context or external evidence. Of course the testamentary draftsman should leave nothing indefinite. At the same time he should avoid resort to technical terms, unless he fully understands their import and consequences. A little law, like a little learning, is a dangerous thing, and is often even worse than the pure simplicity of the layman.

Although an unexecuted discretionary power is as if it never existed, yet it is a general rule of construction applicable both to wills and deeds, that where a power is directed to be exercised in terms that are construed inoperative and not discretionary, the power is a trust, and will be executed by the court in default of appointment, in case the subject matter and objects of the power can be distinctly ascertained.¹ Three conditions, then, must concur in order that the power be deemed a trust,

¹ *Brown v. Higgs*, 4 Ves. 708; 8 Ves. 561.

or that the specified beneficiaries take trust interests by implication in default of appointment. These three conditions are: 1, imperativeness of request that the donee execute the power; 2, certainty of subject matter; and, 3, of object.¹ Judge Redfield² gives a strong opinion with respect to the natural value of mere hortatory expressions in a will.³ The adoption by statute of the rule in *Gilbert v. Chapin* is, however, not needed in England, if, as is alleged, the later cases run in the direction of the American rule.⁴ The opinion of Jarman, however, is of so much weight as to be likely to turn the scale in the direction referred to, if it has not veered hither already. No great progress, however, has yet been made in this respect. Even in many American cases as great latitude has been exhibited in the construction of terms as in England,⁵ so that the doctrine in *Gilbert v. Chapin* is by no means, as yet, firmly established here.

Of course, if it is plain from the will that the testator intended that the donee of the interest or power should have a choice as to the carrying out of the ulterior recommendation, there is no trust.⁶ Nor will the court interfere if the discretion given to the trustee is reasonably exercised by him.⁷

There are, indeed, but comparatively few American

¹ *Briggs v. Penny*, 3 Mac. & G. 554; *Harding v. Glyn*, 1 Atk. 469; *Wright v. Atkyns*, Turn. & Russ. 143; see notes to *Harding v. Glyn*, 2 W. Tud. L. C. 2d ed. 184; 2 Story Eq. Jur. § 979 a; *Joel v. Mills*, 7 Jur. S. 389; *Little v. Neil*, 10 W. Rep. 592; 1 Jarm. (ed. 1861) 374.

² Vol. II, 423.

³ See *Gilbert v. Chapin*, 19 Conn. 342.

⁴ 1 Jarm. 363; *Bayne v. Crowther*, 20 Beav. 408.

⁵ See *Collins v. Carlisle*, 7 B. Monr. 14; *Bull v. Bull*, 8 Conn. 47; *Prett v. Land*, 36 Miss. 495; *Gamble v. Dabney*, 20 Tex. 69.

⁶ *Erickson v. Willard*, 1 N. H. 217; *Lucas v. Lockhart*, 10 Sm. & Mar. 36.

⁷ *Sharon v. Simons*, 30 Vt. 458; *Hawes Place Society v. Hawes' Fund*, Cush. 454.

cases on the question of precatory trusts. The whole doctrine, however, underwent a searching review in Coates' appeal,¹ decided by the Supreme Court of Pennsylvania. In that case the testator was possessed of considerable real and personal estate. He gave the "use, benefit and profits of his real estate to his wife for life, and also all his personalty, of whatever description, absolutely, in the full confidence that she would leave the *surplus* to be divided at her decease justly among his children." He then, after devising certain portions of his realty to his sons, and giving annuities to his daughters out of his personal estate, which were to cease on their marriage, went on to direct that in case the marriage or education of his children should make an addition to the *income* of his wife necessary, certain portions of his real estate should be sold, and the proceeds placed at her disposal. The court held that the widow took merely a life estate in the personalty as well as the realty, and that the word "surplus" meant that definite residue which would remain after the purposes first mentioned in the will were satisfied.

Rogers, J., when delivering judgment in that case, said: "Setting aside the words 'absolutely' and 'surplus'—of which I shall speak hereafter—it cannot be doubted that this case falls within the principle of the cases cited, and, particularly, of *Wright v. Atkyns*, 17 Ves." He then, further on, adds: "With the utmost deference to the wisdom of the profound jurists who seem to censure the judgment of their predecessors, I hope it will not be considered as presumptuous if I venture to adhere to and vindicate the propriety of the ancient doctrine."

The words "absolutely" and "surplus" certain-

¹ 2 Barr, 129.

ly militated against the judge's reasoning. The word "surplus," too, hardly admitted of the definite interpretation he put upon it. However, His Honor considered that none of the cases supposed to be adverse strictly applied, and, consequently, that it was a fit opportunity to uphold the doctrine of *Atkins v. Wright*, *Brown v. Higgs* and *Harding v. Glyn*.

In America, therefore, there is not perhaps the supposed tendency to depart from the spirit of these cases. Notwithstanding the array of text writers of a contrary opinion, there is no new current of any great strength in the late decisions. In *Brunson v. King*,¹ a testator had made a settlement at the time of his marriage, but retained in it a power of revocation by deed or will. In his will he expressly confirmed the settlement, and then afterwards expressed a "wish" which would be inconsistent with the previous confirmation. It was held that the "wish" was inoperative to engraft a trust upon the settlement. But, this decision was founded not upon the weakness of the precatory term to effectuate the intended trust, but on its inconsistency with the plain confirmation of a previous instrument executed for the most valuable consideration known to the law.

The English cases, up to the present time, do not appear to have seriously departed from the rule in *Brown v. Higgs*.² In the case of *Lawless v. Shaw*,³ for instance, the devisee was requested to continue an old steward in his office. This was held by the House of Lords not to be a precatory trust, since, as such, it would be inconsistent with the preceding plenary devise. Nor are the cases of *McCulloch v. McCulloch*,⁴ and *Graves v. Graves*,⁵ any great innovations towards the doctrine

¹ 2 Hill Ch. 483.

² Lloyd & Gould, 154; s. c. 5 Cl. & Fin. 129.

³ 13 Irish C. 182.

⁴ *Ut sup.*

⁵ 11 W. R. 504.

contended for. The doctrine in *Gilbert v. Chapin*,¹ is plausible in the abstract, but its practical faultiness is patent where, as in that case, the recommendation relates to the testator's own children, and the donee of the power is his wife. The reason for discarding mere hortatory expressions does not apply to such a case, because a testator purposely uses mild language to a wife, although if he thought she would fail in her parental duty towards their common offspring, he would be more explicit. Considerations of moral duty, however, unfortunately, have induced the courts to incline still further against holding the trusts imperative. For instance, a request to a parent to use the interest given him for his children's benefit is weaker in their behalf than if the request was made to a stranger.²

The opinion that the current of recent decisions is against converting the legatee into a trustee is supposed to derive confirmation from *Sale v. Moore*.³ But in *Sale v. Moore* the subject of the bequest was indefinite. A like observation is applicable to *Bardswell v. Bardswell*.⁴ The principle of *Harding v. Glyn* is at all events intact, and even though the subject be indivisible, or one object out of a class is to be selected by the trustee, the English Court of Chancery will nevertheless, even at the present day, if possible, execute the power.⁵ The tendency of the English courts latterly is even to execute precatory trusts, even if the objects are in terms indefinite, and in cases where formerly the trust would prob-

¹ 19 Conn. 342.

² *Brown v. Cassamajor*, 4 Ves. 498.

³ 1 Sim. 504; see *Hoy v. Master*, 6 Sim. 568.

⁴ 9 Sim. 319; *Le Maistre v. Bannister*, *Préc. Ch.* by Finch, 200, *n.* 1; *Pope v. Pope*, 10 Sim. 1.

⁵ *Richardson v. Chapman*, 7 Bro. P. C. 318, Toml. edit; *Moseley v. Moseley*, Rep. & Finch, 53; *Brown v. Higgs*, 5 Ves. 504; see *Cruwys v. Colman*, 9 Ves. 319.

ly have been held to be void for uncertainty. Especially will the trust be now enforced if the donee of the power take not the whole interest, but merely for life.¹ As Story, Jarman, Redfield, and White and Tudor, however, consider that the recent tenor of the cases is in conformity with their own views on this question, this will probably be the direction of future adjudications in questions of precatory trust, where the context is not doubtful by the existing decisions.

§ 3. *Terms of request.*

The expression of a mere wish or desire has been long held by the courts to be equivalent to an imperative direction.² The term "recommend," though sometimes not considered imperative in America,³ has been held in England to create a trust.⁴ A trust is also raised by the terms "request,"⁵ "wish and request,"⁶ "dying request,"⁷ "entreat,"⁸ "a last wish to daughter to give grandchildren,"⁹ "desire,"¹⁰ "advised him to settle,"¹¹

¹ Howarth v. Dewell, 6 Jur. N. S. 1360.

² Malim v. Keighley, 2 Ves. 333; Knight v. Roulton, 11 Cl. & F. 3; Knight v. Knight, 3 B. 148; Briggs v. Penny, 3 Mac. & G. 546; Cary v. Cary, 2 Sch. & Lef. 189.

³ Gilbert v. Chapin, 19 Conn. 342.

⁴ Ford v. Fowler, 3 B. 146; see Johnson v. Rowlands, 2 De G. & Sm. 3; and Meggison v. Moore 2 Ves. Jr. 630; Knott v. Cotete, 2 Phill. C. 192.

⁵ Nowlan v. Neligan, 1 Bro. C. C. 489; Pierson v. Garnet, 2 Bro. C. C. 226; Bernard v. Minshull, 1 Johns. 276.

⁶ Foley v. Parry, 2 My. & K. 138.

⁷ Pierson v. Garnet, 2 Br. C. C. 37, 226.

⁸ Prevost v. Clarke, 2 Mad. 458.

⁹ Hinxman v. Poynder, 5 Sim. 546.

¹⁰ Mason v. Limbury, cited in Vernon v. Vernon, Amb. 4; Cruwys v. man, 8 Ves. 319.

¹¹ Parker v. Bolton, 5 L. J. Ch. N. S. 98.

"to apply the same,"¹ "trusting,"² "in the full confidence" that he will give my children support,³ "confiding,"⁴ "with power,"⁵ "not doubting,"⁶ "it is my wish that my son shall add to the advancement he shall make to his son R.,"⁷ "well knowing,"⁸ "hoping,"⁹ "to be disposed of for the benefit of herself and her children,"¹⁰ "to be applied for" the maintenance of donee's children.¹¹ But the primary meaning of all these expressions, as interpreted by the preceding cases, may, as in all other instances, be controlled by the context.¹²

The following expressions standing alone, and not corroborated by the context, raise no trust: "liberality;" "justice;"¹³ "sovereign control over my property;"¹⁴ "to be disposed of in such way as my wife shall think proper;"¹⁵ "not doubting that she will consider my near relations;"¹⁶ or "discharge the trust re-

¹ *Salisbury v. Denton*, 3 Kay & J. 529.

² *Baker v. Mosley*, 12 Jur. 740.

³ *Warren v. Bates*, 98 Mass. 274; *Webb v. Wools*, 2 Sim. N. S. 267.

⁴ *Griffiths v. Evans*, 5 Beav. 241; *Wace v. Mallard*, 21 L. J. Ch. 355; *Gully v. Cregoe*, 24 B. 185; see *Winch v. Brutton*, 14 Sim. 379, and *Webb v. Wools*, 2 Sim. N. S. 267.

⁵ *Howarth v. Dewell*, 9 W. R. 27; *Massey v. Sherman*, Amb. 520; s. c. 1 Atk. 389.

⁶ *Parsons v. Baker*, 18 Ves. 476.

⁷ *Reed v. Reed*, 30 Ind. 313.

⁸ *Briggs v. Penny*, 3 Mac. & G. 546.

⁹ *Harland v. Trigg*, 1 Bro. C. C. 142.

¹⁰ *Crockett v. Crockett*, 2 Phill. 553; *Rankes v. Ward*, 1 Hare, 445; *Woods v. Woods*, 1 My & Cr. 401.

¹¹ *Browne v. Paull*, 1 Sim. N. S. § 92; *Costabadie v. Costabadie*, 6 Hare, 110; *Byrne v. Blackburn*, 26 B. 41; but see *Hammond v. Neame*, 1 Sim. 35.

¹² *Meredith v. Heneage*, 1 Sim. 542; 10 Price H. L. 706; *Winch v. Brutton*, 14 Sim. 379.

¹³ *Knight v. Boughton*, 11 Cl. & Fin. 513.

¹⁴ *Winch v. Brutton*, 14 Sim. 379.

¹⁵ *Johnson v. Rowlands*, 2 De G. & Sm. 356.

¹⁶ *Sale v. Moore*, 1 Sim. 534.

posed in him by remembering my children;"¹ "having full confidence in her sufficient and judicious provision for my dear children;"² "to enable her to maintain her children;"³ "remembering always the church and the poor."⁴

As to requests to continue tenants in the occupancy, see *Tibbets v. Tibbets*.⁵ As to retaining stewards in their office, see *Lawless v. Shaw*.⁶ As to the appointment of a certain person to an auditorship, or similar office, see *Williams v. Corbet*.⁷

Jarman is of opinion⁸ that many of the early cases, where wills and parts thereof were held void for uncertainty, would not be followed at the present day. Yet, with respect to precatory trusts, he considers⁹ that the courts are more rigid than formerly. This observation of this distinguished author, therefore, can only be correct as regards the meaning of the precatory terms.

§ 4. *Definiteness of subject-matter.*

The degree of certainty necessary to imbue a power with the incidents of a trust must be construed by the light of the general rules, according to which Chancery often cuts down an indefinite to a definite gift. In all such cases the court will execute the power, if it can by any means eliminate the element of uncertainty.¹⁰ Of

¹ *Bardswell v. Bardswell*, 9 Sim. 319.

² *Fox v. Fox*, 27 B. 301.

³ *Thorp v. Owen*, 2 Hare, 610; *Benson v. Whittam*, 5 Sim. 22.

⁴ *Curtis v. Rippon*, 5 Mad. 434; see also *Hart v. Hart*, 2 Dessaus, 83; *Farwell v. Jacobs*, 4 Mass. 634; *Bolling v. Bolling*, 5 Munf. 334; *Lydnor v. Lydnor*, 2 Munf. 263.

⁵ 19 Ves. 656.

⁶ *Ll. & G.* 154.

⁸ Vol. I, 316; vol. II, 349.

⁹ Vol. II, 349.

⁷ 8 Sim. 349.

¹⁰ *Thorp v. Owen*, 2 Hare, 610.

course, there will be no trust if the terms used by the testator, however certain, also imply that the donee of the power was invested with a discretion to exercise or not the power as he pleased, and to abstract and dispose of, or consume for his own benefit, the whole of the subject-matter of the power. Accordingly, no trust has been raised by the following phrases: "not doubting but that she will dispose of what shall be left at her death to our two grand-children;"¹ "what shall be remaining;"² "the bulk of my said residuary estate;"³ "what she may have saved;"⁴ "what they have."⁵

• The implied gift is always co-extensive with the quantity of interest governed by the power. If the power be one to appoint in fee, the objects, therefore, take an implied fee in default of appointment.

Where money is given to purchase for the legatee a ring, house, annuity, &c., he takes the money in any event, and not merely for the particular trust directed by the testator.⁶ But, if the trustee has a discretion as to the amount to be thus expended, and lays out only part, the court will not interfere.⁷

Income, if directed to be applied for maintenance at the discretion of a trustee, does not pass to the assignees in bankruptcy of *cestuys que trust*. The discretion of the trustee in such a case will not be controlled by the court.

¹ *Wynne v. Hawkins*, 1 Bro. C. C. 179.

² *Green v. Marsden*, 1 Drew. 647.

³ *Palmer v. Simmonds*, 2 Drew. 221.

⁴ *Cowan v. Harrison*, 10 Hare, 234.

⁵ *Lechmere v. Lavie*, 2 My. & K. 197; but see *Horwood v. West*, 1 S. 1 St. 387.

⁶ *Barlow v. Grant*, 1 Vern. 255; *Nevill v. Nevill*, 2 Vern. 431.

⁷ *In re Sanderson's Trusts*, 3 Kay. & J. 497; and the residue will lapse. *Beevor v. Partridge*, 11 Sim. 229.

§ 5. *Definiteness of object.*

Definiteness of object is the third condition necessary to the raising of an imperative trust. The word "family" is a sufficient designation of objects.¹ The phrase, "our united relatives," however, was held to be void for indefiniteness in *Reeves v. Baker*.²

Under a power to appoint to relatives, only next of kin will take in default of appointment. But, the donee of the power may appoint to any relative, however remote.³ But, if the donee has merely a power of distribution, and not of selection, an appointment to relatives who are not next of kin will be void.⁴ If the power is to appoint to "nearest relatives," only next of kin can be appointees.⁵

The term survivors admits, as already shown, of various periods when the survivors are to be reckoned. A power to distribute or select, however, will be executed by the court amongst those who answer the description of the specified class at the period of the testator's death.⁶ But, if the donee of the power take a life interest, the class is then deemed to comprise only those who will suit the description at the death of the tenant for life.⁷ So, where the power is to be exercised by the donee at the time of his death, the class of objects will comprise only those then living.⁸

¹ *Wright v. Atkyns*, Coop. 111; overruling *Harland v. Trigg*, 1 Bro. C. C. 142.

² 18 B. 372.

³ *Harding v. Glyn*, 1 Atk. 469; 2 *White & Tud.* 685; see *Brown v. Higgs*, 5 Ves. 501; 8 Ves. 572.

⁴ *Pope v. Whitcombe*, 3 Mer. 689; see *Clapton v. Bulmer*, 10 Sim. 426; 5 My. & Cr. 108.

⁵ *Goodinge v. Goodinge*, 1 Ves. 231; *Edge v. Salisbury*, Amb. 70.

⁶ *Cole v. Wade*, 16 Ves. 27.

⁷ See *Birch v. Wade*, 3 V. & B. 95.

⁸ *Pierson v. Garnet*, 2 Bro. C. C. 38, 226.

The objects too, taking in default of appointment are only those who survive the donee. For to such only could an express appointment be made by the donee, and the implication is only an echo of the express power.¹ Jarman thinks² that an implied gift to relatives will only comprise those who survive the donee of the power, even if its exercise may be by deed as well as by will. But there seems to be no reason for thus construing an implied gift to relations in a way different from the ordinary construction of an implied gift to a class, although English authority is in favor of Jarman's view.

Where the bequest was to such persons as A. shall appoint, and, in default of appointment, to his surviving brothers and sisters, the period of survivorship was held to relate to the death of A. But where objects of a special power take in default of appointment, their interest is vested from their birth. The rule in *Davies v. Thorns* was laid down in analogy to the doctrine in *Cripps v. Woolcot*.³

There is no implied gift to the class where there is an express gift over in default of appointment to or among the class.⁴ When the trust is executed by the court, in favor of the class, they take individually or *per capita* as joint tenants, though by the statute they might only claim *per stirpes*.⁵

An express gift to the objects of the power, in case its donee dies before the testator, will not prevent them from taking by implication in default of appointment.⁶

¹ See *Kennedy v. Kingston*, 2 Jac. & W. 431.

² Vol. I, 486.

³ *Davies v. Thorns*, 3 De. G. & Sm. 347.

⁴ *Davidson v. Proctor*, 14 Jur. 31; *Walsh v. Acton*, 4 Ves. 171; *Bird v. Wood*, 2 S. & S. 400.

⁵ *Walter v. Maunde*, 19 Ves. 428.

⁶ *Kennedy v. Kingston*, 2 Jac. & Walk. 431.

But an express gift to them in default of appointment will have this effect according to the maxim, that an express gift precludes implication, and if the gift in default of appointment is to other objects as well as those contemplated in the power, a qualification imposed on the former will not be necessarily extended to the latter.¹

Sometimes the donee of the power and its objects will take jointly.² But this rule is not of very frequent application.³ If the donee of the fund or power be a parent of the ulterior beneficiaries, he will, in a doubtful case, be more likely to be decreed to take the absolute interest, than if he is no relative of the other parties.⁴ A devise with an absolute power has been in some American cases held to create no trust, even though there be quasi precatory terms added.⁵

If the gift be clearly in trust, and the trust fail through uncertainty, there is a resulting trust to the testator's heir or next of kin, according as the subject matter of the gift is realty or personalty.⁶ The doctrine in *Burgess v. Wheate*⁷ does not apply in these cases. But if the gift be couched in absolute terms, subsequent precatory words will not cut it down to a mere trust.⁸

¹ *Smith v. Death*, 5 Madd. 371.

² *Jubber v. Jubber*, 9 Sim. 503; *Chambers v. Atkins*, 1 Sim. & Stu. 282; *Re Harris*, 7 Exch. 344.

³ *Crockett v. Crockett*, 2 Phill. C. C. 553.

⁴ *Thorp v. Owen*, 2 Hare, 607.

⁵ *Kinter v. Jenks*, 43 Penn. St. 448; citing *Heath v. Knapp*, 10 Watts, 405; 4 Penn. St. 228.

⁶ *Fowler v. Garlike*, 1 R. & My. 232; *Stubbs v. Sargon*, 2 Keen. 253; *Briggs v. Penny*, 3 Mac. & G. 546; *Bernard v. Minshull*, 1 Johns. 276.

⁷ 1 Eden, 92.

⁸ *Bonser v. Kinnear*, 2 Gif. 195; see *Wells v. Doane*, 3 Gray, 201; *ex parte Payne*, 2 You. & C. 636; 2 Jarm; 342.

Where an interest and not merely a power is transferred to the trustee, any property not required for the purposes of the trust will thus sometimes belong to the trustee beneficially, and there will be no resulting trust for the testator's heir at law or next of kin.¹ Even when the court will execute the trust, yet, if it be a trust by implication, that is to say, if an interest and not a mere power be given to the donee, he will during his life have all the incidents of propriety, as, for instance, the right to fell timber.²

Indefiniteness of object, it must be remembered, does not defeat a charitable use according to the preceding rules.³

The testamentary draftsman should carefully avoid all ambiguous directions, and state clearly, whether each trust was intended to be imperative, or was left wholly in the discretion of the trustee. Unless the will is thus explicit, or else has been drawn after an approved technical model, it is likely to be litigated in the present supposed shifting state of the authorities both here and in England, respecting precatory trusts or trust powers.

When the power is one of distribution, the implied beneficiaries take as tenants in common. But if the power is one of selection, they take as joint tenants. This is Jarman's opinion.⁴ The distinction, however, seems refined, and as equity constitutes donees under executory trusts tenants in common, there is reason to contend that, in the absence of authority on the point, equity would regard the trust as so far executory, and

¹ Wood v. Cox, 2 My. & Cr. 684.

² Wright v. Atkins, 17 Ves. 255.

³ See chap. 26, *infra* § 6, Charitable Uses.

⁴ Vol. II. 168.

requiring the substantial action of the court, as to enable it to use its whole equitable functions, and to constitute the beneficiaries tenants in common.

Where the property is given in default of appointment to persons individually (and not as a class), as tenants in common, and one of them dies in the lifetime of the testator, the power and the gift lapse *pro tanto*. But, if all survive the testator, and one dies afterwards, the power still remains as to the whole. The distinction seems to be founded in reason. The power being one of distribution only is an accessory of the gift, and, when the principal lapses *pro tanto*, the accessory follows *pro rata*. But when the gifts all vest by reason of the beneficiaries surviving the testator, the power also is rendered indefeasible, and may be exercised irrespective of events not expressly limiting its execution. The distinction is at all events established by authority.¹ If the objects are joint tenants, or a class, neither the gift nor power can suffer by lapse, unless all the members, or all but one, die in the lifetime of the testator.

As an appointment cannot be made to a deceased child whose share under the gift once had vested, the only way in which the property can reach him is to leave a part unappointed. The representatives of the deceased child will then take his share in this unappointed portion.

In England at present, under a power of distribution, only a nominal share need be appointed to each member of the class. But, it is still necessary to give even a nominal share to each member, or the omission

¹ See 2 Jarm. 168, note; 1 Sug. Pow. 6, ed. 534.

will be fatal to the appointment. In the United States it is necessary to give not only a nominal but a substantial share (as in England before the Act on Illusory Appointments), to each member of the class of donees, except in those States where this doctrine of equity has been altered by statute or construction.

CHAPTER XVIII.

INCUMBRANCES.

§ 1. *Mortgages.*

At common law, lands were not liable for debts. The theory of the feudal system was, that land, when held by military tenure or freehold, was an *honorarium*, or honorable stipend for public services, and that it was contrary to principles of public policy that such a stipend should be liable to be sequestered, and the military tenant thus incapacitated from defending his country in war. Under Edward I, this rule was altered, and half the lands of the freeholder were liable to be extended. They were not, however, made liable in England for debts in general after the death of the incumbrancer, until the last reign. Even now, except where a statutory provision applies to the contrary, the personalty is the primary fund for the discharge of a testator's debts. It is thus always important to know what the common law rule on a point is, since, unless statute law covers the whole area of the common law rule, the remainder of the ground remains still subject to the old law. Hence has partly arisen the doctrine that the heir, and sometimes the devisee as representing the heir, is favored in law. The reason is, he was so favored at common law, and statutory provisions have not yet canceled all his rights. It is only as regards rules of law, however, and the incidents of property, that the heir is favored. So far as rules of construction

are concerned, equally strong language appears necessary to defeat the rights of the testator's next of kin to personality as the rights of the heir to realty.

The personality was formerly, in England, the primary fund for the payment of mortgage debts, and is still such in almost all of the United States. The devise of a mortgaged estate in England did not, prior to the change in the law referred to, take the land with its incumbrance, even when the devise to him was expressly "subject to the mortgage debt." This description, it was thought, was specific, and related to the identification of the land. A different construction is put upon the word "subject" in the United States.¹ Even when the property devised subject to the mortgage was given upon trust for sale, and the proceeds were to be applied in the first instance in payment of the mortgage debt, yet the devisees of the residue of the proceeds were held entitled in England to exoneration out of the personality.² But if a particular provision be made for payment of the debt out of the mortgaged land, and only the remaining interest is devised, the land mortgaged was the primary fund for payment. So any express charge of the debt on it makes it the primary means for payment; otherwise the express charge would have no force.³

The case of *Van Winkle v. Van Houten*⁴ shows that the rights of a devisee of mortgaged land are not as strictly guarded in the United States as in England, with respect to the present point, prior to the passing of the 17 & 18 Vict. c. 113. The English cases, therefore, on this whole doctrine are by no means conclusive

¹ *Van Winkle v. Van Houten*, 2 Green. Ch. 172.

² See *Bickham v. Cruttwell*, 3 My. & Cr. 763; *Wythe v. Henniker*, 2 Myl. & Kee. 635.

³ *Evans v. Cockeram*, 1 Coll. 428.

⁴ 2 Green. Ch. 172.

authorities here, except where the construction is not founded on partiality towards the heir, but on the ordinary grammatical meaning of the words in question. The heir, indeed, is not favored to the extent supposed, if at all, in questions of construction. The case of *Forth v. Chapman*¹ shows that in some cases the next of kin are more favored. However, our courts will hold the scales evenly between heirs, next of kin, and beneficiaries.

The personalty continues to be the primary fund for payment of debts and legacies, even though the real estate be charged with such,² or there be a direction to pay the charges out of the income of the real estate.³ Nor is the devisee of a mortgaged estate entitled to exoneration out of personalty specifically bequeathed, or out of pecuniary legacies. Neither is he entitled to exoneration at all, if the mortgage debt or charge was not contracted by his testator, but devolved on him with the land by devise, descent, or purchase,⁴ unless he did an act amounting to an adoption or *quasi* novation of the charge.⁵

The reason of the distinction is, that where the testator himself was the mortgagor, his personalty was benefited, and ought to recoup. But where he merely took the land subject to the burden, his personalty was not increased by the mortgage.⁶

As to what acts will amount to an adoption of the mortgage, so as to transfer its primary onus to the devisee's personalty, see the notes to *Duke of Ancaster*

¹ 1 P. Wms. 163.

² *Lupton v. Lupton*, 2 Johns. Ch. 614; *McKay v. Green*, 3 *Id.* 56.

³ *Hawley v. James*, 5 Paige, 318, 448, 469.

⁴ But see *Thompson v. Thompson*, 4 Ohio, N. S. 333.

⁵ See *Cumberland v. Codrington*, 3 Johns. Ch. 229; 2 Story Eq. Jur. § 1248; 4 Kent, 5 ed. 420.

⁶ See *Hughes v. Dehon*, 3 Gray, 205.

v. Mayer.¹ Giving a bond or covenant on the transfer of the mortgage will not have this effect. But, if the mortgagee be a party to the transaction, the case may, with a slight variation of circumstances, involve an adoption of the debt, as between the real and personal representatives of the owner of the land mortgaged. Of course, any explicit act *inter vivos*, or plain intimation in the will, will vary the rights of the mortgagee's heir or devisee and next of kin. Yet, to shift the burden from realty to personalty, the testator must have directly contracted to meet it, or else expressed a clear intention in his will that the personalty was to be the primary fund for satisfaction of the debt.²

Semble, the implied adoption of a mortgage by a testator must work a novation of the real contract, in order to alter the relative rights of his real and personal representatives. It must be not a mere personal covenant even with the mortgagee, but a fresh or an additional *charge* on the land as by inserting a new proviso for redemption, or else it must be a plain purchase, not merely of the equity of redemption, but of the mortgagee's whole interest in the land.³ This distinction may perhaps reconcile the cases on this point.

The devisee of a mortgaged estate is entitled to exoneration⁴ out of: 1, the general personalty; 2, lands expressly devised for payment of debts; 3, lands descended to the heir; 4, lands charged with debts. If such charge on land be general, the devisee of the burthened land contributes rateably. If no land be charged, and classes 1, 2 and 3 are exhausted, the de-

¹ 1 White & Tud. Lead. Cas. Eq. 2d. ed. 505 *et seq.*

² *Cumberland v. Codrington*, 3 Johns. Ch. 229, 272; see *Hunter v. Hunter*, 17 Barb. 25.

³ *Cope v. Cope*, Salk. 449; see 4 Kent, 5 ed. 421, *Earl of Oxford v. Lady Rodney*, 14 Ves. 417.

⁴ *Hewes v. Dehon*, 3 Gray, 205.

vised estate bears its own burden. Class 3 is entitled to exoneration out of classes 1 and 2.¹ If one person ultimately unites in himself both characters of mortgagor and mortgagee, the mortgage will be presumed to become extinguished, unless it be better for the owner or his creditors to regard the security as still subsisting.² If mesne estates subsist between the charge and the fee, this is no merger of the mortgage. If a merger once occurs at law, however, equity cannot revive the charge. The personal representatives of the owner never have an equity against the heir, nor conversely.

The cogent nature of an old rule of law is very well shown by the course of the decisions on 17 & 18 Vict. c. 113. It was at first thought that as strong language was required to exonerate the mortgaged estate from the mortgage debt as is necessary to release the personality in other cases from its primary liability to the payment of the testator's debts. But, it has been held that if the mortgaged estate is specifically devised without reference to the mortgage, and there is another fund mentioned in the will for the payment of debts, the act 17 & 18 Vict. c. 113, which exonerates the personality in England, will apply. To exonerate personality, however, in other cases, from its primary liability to debts, not only must the realty be charged, but the personality must be excepted; either expressly or by necessary implication. This strong rule originated at a period when the rights of the heir were scrupulously protected by the courts. But, as the law is not presumed to favor a residuary legatee or the next of kin, the reason of the rule regarding the favor shown to realty in a charge of

¹ As to exoneration, see further, 1 Story, Eq. Jur. § 572-4, 2 *Ib.* § 1245-1247, a; *Livingstone v. Newkirk*, 3 Johns. Ch. 319.

² *Domisthorpe v. Porter*, 1 Ed. 162.

debts thereon did not seem to apply¹ to a statute exonerating mere personalty.

The decision in *Mellish v. Vallins*, however, does not appear to be as consistent with sound principle as is commonly alleged. No doubt, the rule under the old law that a devise of land "subject to the mortgage debt"² did not exonerate the personalty, was extreme. But, where there is a course of decisions showing what is the meaning of a primary liability, a statute is presumed to be founded on the principles of adjudication already recognised, unless it expressly provides to the contrary. The 17 & 18 Vict. c. 113 was intended to put the statutory rule of construction on the same footing as the old rule respecting personalty. To say that the statute adopted no new rule of construction is a begging of the question either way, and chiefly in favor of the view that would regard the act as requiring an exoneration to be made according to the recorded judicial definition of the language necessary to exonerate. A statutory rule is surely as strong as a common law or rather Judge-made one.

If the court, in *Mellish v. Vallins*, considered that less strong expressions would be needful to transfer a liability to, than from, the personalty, as against an heir or devisee, some decisions perhaps would be found to support this position. But, the distinction the Vice-Chancellor drew is one not of degree but of kind, which does not seem to be strictly applicable where the express words of a statute are in question. The principle of *Mellish v. Vallins* is calculated to introduce much uncertainty in cases falling under new acts, which reverse or rather are intended to reverse old rules. The statu-

¹ *Mellish v. Vallins*, 2 Jo. & H. 194.

² *Bickham v. Cruttwell*, 3 My. & Cr. 763.

tory rule, it seems, will not, in England, be moulded by analogy to the one it displaced, but may be based by the judges on new principles of their own. It is true that the decision in *Mellish v. Vallins* is sound sense. But, it is doubtful whether a diversity of rules of construction is not a greater evil than a partial infusion of sense. The rule established by the case referred to has been since altered by statute.¹ But the statutory alteration ought rather to have been to assimilate the other cases, to *Mellish v. Vallins*, especially as this last case seems to have received the approbation of the profession. These questions are certain soon to arise in the United States. In a few States the mortgaged land is already the primary fund for payment of the mortgage. This rule will probably be soon adopted in all the other States, as it is in harmony with the general tenor of our legislation, which seeks to assimilate the incidents of real estate to those of personalty.

§ 2. *Charges.*

An heir was only bound, at common law, by such debts of his ancestor as were under seal and expressly binding the heir. A devisee of land was not liable until the 3 & 4 Wm. & M. c. 14; nor was either the heir or devisee liable, in England, to simple contract creditors of a testator until 3 & 4 Wm. 4, c. 104. Even now, both in England and the United States, the testator's personalty is the primary fund for the payment of debts, and specialty creditors still take priority, unless levelled by a charge of debts in the will. But, if the charge of debts is merely general, a purchaser for value of the lands is not bound to see to the application of the purchase money. *Aliter*, if the debts, charges, or

¹ 30 & 31 Vict. c. 69.

legacies are specified¹ in any will or deed forming part of the title to the land in question. Two questions thus arise in respect to a charge of debts or legacies, viz.: first, whether the charge is effectual; and, secondly, whether it inverts or disturbs in any way the natural order of administering the real and personal estate.

The personalty is, in almost all of the American States, the primary fund for discharging debts, even by mortgage,² unless the testator otherwise directs; and here, as well as in England, land is not liable for legacies, unless they are charged thereon; and a doubtful clause will, it seems, be interpreted favorably to the heir or devisee.³

An annuity, likewise, is payable only out of the personalty, and not out of the realty, either devised or descended;⁴ and even when payable out of real and personal estate, the land is still liable only on a deficiency of personal assets, unless the testator provides to the contrary.

After giving a legacy, a testator devised "the balance" of his estate to other persons. On a deficiency of assets, the legacy was held to be charged on the real estate.⁵

In determining whether a legacy is charged on real estate, the courts in America have sometimes admitted

¹ See *Harris v. Fly*, 7 Paige, 421; *Baylor v. Dejarnette*, 13 Gratt. 152; *Pickering v. Pickering*, 15 N. H. 281; *Mahar v. O'Hara*, 4 Gilm. 424; *Dodge v. Manning*, 11 Paige, 334.

² 2 Williams' Ex. (2 Am. ed.) 1215; *Garnet v. Macon*, 6 Call. 608; s. c. 2 Brock, 185; *Adams v. Brackett*, 5 Met. 280.

³ See 2 Story Eq. Jur. § 1246; *Lewis v. Thornton*, 6 Munf. 87. As to charges on land, see further, *Gray v. McDowell*, 6 Bush. (Ky.) 475; *Gerkens, Estate*, 1 Tuck. (N. Y. Surr.), 49; *Okeson's Appeal*, 59 Pa. St. 99; *Baker's Appeal*, 59 Pa. St. 313; *Miller's Appeal*, 60 Pa. St. 404.

⁴ See *Hume v. Wood*, 8 Pick. 478.

⁵ *Roman Catholic German Church of Albany v. Wachter*, 42 Barb. 43.

parol evidence of the nature of the property and circumstances of the testator.¹ Such an ambiguity is sometimes, also, construed in England with the aid of parol evidence. Thus, where renewal fines or other charges are directed to be raised out of rents and profits, the value of the annual rents will be considered by the court, as to the question whether the charge is confined to the annual rents, or may be raised by a sale of the land.²

To exonerate the personalty from its primary liability to the testator's debts, not only positive words of charge must be used as to the realty, but negative words of exception must be also predicated, expressly or by necessary implication, of the personalty.³ Therefore, neither a charge of debts on all or a part of the testator's lands, nor a devise upon trust for sale, nor the creation of a term for such a purpose, exonerates the personalty. Thus, in *Bridgman v. Dove*,⁴ land was devised to A., he paying the debts and legacies. Yet the personalty was held not to be exonerated. Even if it is expressly subjected only to a few debts, yet it continues primarily subject to all.

The personalty is exonerated if the realty is directed to be sold to pay debts, and the residue is to "be added to the testator's personal estate."⁵ But an exception expressly in favor of a legatee does not necessarily enure for the benefit of the next of kin in case of a lapse.⁶ If,

¹ *Dey v. Dey*, 4 C. E. Green, 137.

² See *Allan v. Backhouse*, 2 Ves. & Bea. 65; *Shaftesbury v. Duke of Marlborough*, 3 Law Jour. N. S. 30.

³ *Schermerhorn v. Barhydt*, 9 Paige, 29, 49; see *Duke of Ancaster v. Mayer*, 1 White & Tud. Lead. Cas. and notes thereto, 2d ed. 505, *et seq.*

⁴ 3 Atk. 201; but see *Lockhart v. Hardy*, 9 B. 397.

⁵ *Holliday v. Bowman*, cit. 1 B. C. C. 145.

⁶ See 2 Jarm. 592.

however, the land is charged and the whole personal estate is bequeathed specifically and not as a residue, the personalty is exonerated.¹

An exoneration of the personalty in favor of A. does not by the lapse of A.'s legacy enure to the benefit of the executor or next of kin.² But, a direction to pay debts charges all the land devised to executors jointly, whether or not they take any beneficial interest in it, and will usually give them the legal fee. But, such a direction is no charge on land not devised to executors, where there is no word referring directly or indirectly to the land.³ However, a direction by a testator that his debts shall be paid *by his executors*, charges in England all the real estate devised to them,⁴ but no other land. Yet, if the testator omitted the reference to his executors, the direction to pay his debts would, in England, amount to charging them on all his land whether devised or not, on the ground that the clause would otherwise be inoperative.⁵ But, in the United States, a mere direction to pay debts and legacies does not amount to a charge thereof on the testator's real estate.⁶ Yet, if there is a devise of land "after payment of debts and legacies," or when the debts and legacies are "first" paid, the land is charged.⁷ If the words used be sufficient to charge the land devised, *a fortiori*, they would seem to charge lands descended, where the charge is not on the specific lands devised, but is con-

¹ Larke v. Mann, 53 Barb. 267; Lance v. Aglionby 27 B. 65; Collis v. Robins, 1 De G. & Sm. 131; Rhodes v. Rudge, 1 Sim. 79.

² 1 Rep. Leg. by White, 744.

³ See Dowling v. Hudson, 17 B. 248.

⁴ Henvell v. Whitaker, 3 Russ. 343.

⁵ Clifford v. Lewis, 6 Madd. 33; Cook v. Dawson, 29 B. 126.

⁶ Lupton v. Lupton, 2 Johns. Ch. 624.

⁷ *Id.*

tained in the general phrase, "after my just debts are paid, &c."¹

As to powers to executors to sell, see further *Hunnier v. Rogers*.²

Questions of exoneration are more difficult than those relating to charges simply. An exoneration of the personalty, however, or a transfer of the primary liability of one fund to another, may be made by the testator not only expressly, but also by implication.³

Legacies are charged on the land where the "residue" of the realty and personalty is bequeathed in one mass.⁴ But a charge of legacies on all the real estate of the testator does not charge lands specifically devised.⁵ In *Conron v. Conron*, the testator used every conceivable device known to the period for charging real estate, yet his intention failed. The House of Lords proved too subtle for him. If the charge included debts, however, as well as legacies, the debts being, then a charge on lands specifically devised, would have fastened the legacies also on the specific devises.

Where a testator devised to one of his sons two third parts of a certain farm, with a limitation that all his just debts should be paid, this was held to charge both the land and the devisee.⁶ The words, "after my debts and funeral charges are paid, I devise," &c., have also been held to charge the land with the payment of the

¹ See *Shallcross v. Finden*, 3 Ves. 738.

² 55 Barb. N. Y. 85; *Dunshee v. Goldbacher*, 56 Barb. (N. Y.) 579; 8 Abb. (N. Y.) Pr. N. S. 439; *Dodge v. Moore*, 100 Mass. 335; *Cook v. Cook*, 20 N. J. Eq. (5 C. E. Gr.) 375.

³ *Bugbee v. Sargent*, 27 Me. 338; see *Reynolds v. Reynolds*, 16 N. Y. 257; *Harris v. Fly*, 7 Paige, 421.

⁴ *Greville v. Browne*, 7 H. L. C. 697.

⁵ *Conron v. Conron*, 7 H. L. C. 168.

⁶ *Gardner v. Gardner*, 3 Mass. 178; see *Sands v. Champlin*, 1 Story C. Ct. 376.

debts and funeral charges.¹ But the word "estate" alone will not charge the land with debts.²

In *Norris v. Beyea*,³ where legacies charged with an annuity in equal portions became unequal by lapse and survivorship, the annuity was apportioned to the value of the interest taken by the legatees and the representative of a deceased legatee respectively. In *Lawrence v. Holden*,⁴ a devise to testator's widow, of a house free and clear of all incumbrances, was held not to compel the executors to pay the current taxes and assessments out of the testator's general estate.

The personalty is primarily applied to pay legacies when charged on land, as well as debts.

As to the personal liability of devisees to pay charges on their devises, see *Wood v. Wood*.⁵

Assumpsit, however, does not lie by a legatee against the devisee of land charged with the legacy, unless he accepts the devise and promises to pay the legacy.⁶

A charge on the estate does not necessarily give the devisee the fee, even though the amount of the charge be greater than the value of the life estate.⁷ Where a devisee of land is directed to pay "thereout," or "out of the estate," certain legacies, these are charges on the estate, yet they do not by implication enlarge the devise to a fee.⁸ A trust established, however, for the pay-

¹ *Fenwick v. Chapman*, 9 Pet. 461; *Wright v. West*, 1 Cranch C. Ct. 303; see *McCullock v. McLain*, *Id.* 304.

² *Archer v. Deneale*, 1 Pet. 585.

³ 13 N. Y. (3 Kern.) 273.

⁴ 3 Bradf. 142; see *Smith v. Wyckoff*, 3 Sandf. Ch. 77.

⁵ 26 Barb. 356.

⁶ *Gridley v. Gridley*, 33 Barb. N. Y. 25.

⁷ *Olmstead v. Olmstead*, 4 Comst. 56.

⁸ *Gardner v. Gardner*, 3 Mason, 178; S. C. 12 Wheat. 498; *Taft v. Morse*, 4 Met. 523.

ment of charges to continue until a child arrives at a certain age, will not, as a rule, be determined by the child's death before the period specified.¹

Doubtful words will not release the personalty from its primary liability to the testator's creditors.² Indeed, if words anywhere in a will are not interpreted by the context, they will receive only their legal import.³

The fact that a State law renders lands liable to the payment of a testator's debts, will not affect the construction of a charge of debts in the will. And if the creditors will not levy off the property specifically allotted for the payment of their debts, the devisees of such property can marshal.⁴ Debts specifically charged, and not coupled with a general charge of debts, will bind a purchaser from the devisee of the land so charged, in the United States as well as in England.⁵

The priority of the order of charges will sometimes depend mainly on the order in which they are mentioned in the will.⁶ The real estate, however, is rendered the primary fund more readily where the charge is of a specific debt, such as a mortgage, than where there is a general charge of debts.⁷ If a specific portion of *personalty* is appropriated for payment of debts, that portion, unlike land, is the primary fund.⁸

§ 3. *A sole fund.*

The real and personal estate are wholly administered *pari passu*, where the testator directs his land

¹ Hawley v. James, 5 Paige, 318, 462.

² Leaver v. Lewis, 14 Mass. 87; 18 Pick. 29.

³ Annable v. Patch, 3 Pick. 363.

⁴ Potter v. Gardner, 12 Wheat. 498, Supreme Ct. 1827.

⁵ Morancy v. Quarles, 1 McLean, 194.

⁶ Smith v. Wyckoffe, 3 Sandf. Ch. 77.

⁷ Evans v. Cockeram, 1 Coll. 428. ⁸ Bootle v. Blundell, 1 Mer. 193.

to be sold, and mixes up the proceeds with his personalty in one common fund, charged either with debts, legacies or annuities.¹ Sometimes the real estate is the sole fund liable to the charge. This happens where there is a direction to sell land and to pay a certain specified sum not a debt, out of the proceeds. In other cases, if the real fund proves deficient, the personalty may be only secondarily liable.² In other words, the legacy will be demonstrative and not specific,³ and therefore, will not be adeemed if the testator sells the land.

Where the charge is in its nature real, as a jointure or portions under a power, or a devise with a direction to pay certain sums of money, as distinguished from a trust for debts or legacies generally, the personalty is not at all liable.⁴

§ 4. *Dower.*

Dower being a common law right, the presumption is against a widow's being put to her election respecting her dower. Therefore, neither a bequest to her, nor a trust for sale,⁵ nor a devise of part of the land, nor a charge on the whole land, nor a devise of the land to a third person defeats her claim to dower on the remainder. Even a legacy to her of a share of the proceeds of land directed to be sold will not be deemed absolutely irreconcilable with her claim to dower, but the lands will be sold subject to her dower. So, a direction as to the surplus rents will imply that the natural order of

¹ Roberts v. Walker, 1 R. & My. 752; Kidney v. Coussmaker, 1 Ves. J. 436; 2 Ves. J. 267; Tracy v. Tracy, 15 Barb. 503; Whitman v. Norton, 6 Binn. 395; Taft v. Morse, 4 Met. 523.

² Hawkins, p. 290.

³ Foote Appt. 22 Pick. 299.

⁴ 2 Sp. 819; 1 Rep. Leg by White, 731-2.

⁵ Holdich v. Holdich, 2 Y. & C. C. C. 18; Gibson v. Gibson, 1 Drew. 42.

the charges thereon is left undisturbed. In *Gibson v. Gibson*,¹ even a direction touching the rents until sale was held not to put the widow to an election. This case has gone to the very verge of the law. The question in all such cases is, whether the dispositions are absolutely and totally inconsistent with the claim to dower. If by possibility, or by conceiving any state of facts, no matter how improbable, the whole will may be rendered consistent with the wife's common law rights, these will prevail. This principle is frequently acted upon under wills as to the meaning of words and the effect of charges. The primary import of the word or charge will not be changed for a secondary sense, if the primary force of the terms used can have *any* operation.²

It is a rule of construction in America, that equality in the disposition of property by parents among their children is to be favored, and doubtful words will be so construed.³ A widow's claims under a will are also favorably regarded. In *Gale v. Gale*,⁴ a testator bequeathed a homestead to his widow, or an alternative sum of \$1,000, payable within five years after his death, or sooner, if she should prefer to use it in the erection of a house on a certain lot. It was held that the widow could not be barred in her election prior to the expiration of the five years, or prior to a tender by the executors of the alternative devise.

In Massachusetts, the testator's widow may take a third of the residue of the personalty in addition to any gift under the will.⁵ In that State and New York, a

¹ *Id.*

² See Part 1, Prop. II; *infra*, chap. 23, § 5.

³ *Horwitz v. Norris*, 60 Pa. St. 261.

⁴ 48 Ill. 471.

⁵ *Kempton Appl.* 23 Pick. 163; see *Crane v. Crane*, 17 Pick. 422; see Mass. Rev. Stat. c. 60, § 11.

widow is presumed to elect in favor of the will, in case she does no positive act of election within the statutory period. But in England a beneficiary is always presumed to elect against the instrument in question, except that the court will elect for an infant in the manner most advantageous for him. In Illinois, any provision by will is presumed to bar dower, unless the widow repudiate the gift within six months.¹

The phrase "subject to the dower and thirds of my wife," does not entitle the wife to a share in the personality, the meaning of the phrase referred to being well known.²

A legacy to the wife in lieu of dower fails by reason of her electing to take dower.³ But a devise of testator's whole estate, with remainders over, is not necessarily in lieu of dower, and she may take one-third as dowress and the remainder as devisee.⁴ However, a provision for the widow under a trust vesting the entire legal estate in trustees is inconsistent with her right to dower,⁵ and puts her to an election between the testamentary provision and her dower. A general devise of the testator's real estate does not necessarily compel the widow to elect between her dower and a legacy given her in the will. She can retain it and all other benefits given her by the will, unless her retention of her dower operates to defeat some other disposition in the instrument.⁶ Thus, if the testator's land is devised to his widow and his children, equally to be divided between them, this excludes her dower.⁷ But a mere annuity, payable

¹ Ill. Rev. Stat. 1833, p. 624 ; see 1 Jarm. 342, note by Judge Perkins.

² O'Hara v. Sullivan, 30 How. Pr. 278.

³ Hawley v. James, 5 Paige, 318.

⁴ Lewis v. Smith, 9 N. Y. (5 Seld.) 502.

⁵ Savage v. Burnham, 17 N. Y. (3 Smith), 561.

⁶ See Chalmers v. Storril, 2 Ves. & B. 222.

⁷ *Id.*

out of the dower land, is not inconsistent with a claim of dower. There must be an absolute inconsistency between the claim of a beneficiary and the dispositions in a will to raise a case of election.¹ An election, however, must be made by her if there is a devise, either to herself or to others, inconsistent with her claim to dower. Thus, a gift to her of a share or proportion of the land or rents will be considered as inconsistent with her claim of her common law share.² So if the land is devised to a third person, and the mode of his enjoyment of the property, as directed in the will, is inconsistent with dower, she will be put to her election if she takes any benefit under the will. These are cases of necessary implication; but if, by any conceivable hypothesis, the dispositions in the will can be reconciled with the wife's common law rights, she will not be put to her election. In the cases mentioned, however, dower would be inconsistent with the terms of the will. In like manner, powers of leasing, of occupation, or of managing the land, conferred on trustees or others, are also held to be inconsistent with a right of dower, which implies an enjoyment by metes and bounds.³

Where a gift is given to the wife in lieu of dower and the devise of the dowry lands determines, the heir takes then discharged of the dower.⁴ But it has been decided that she can claim a share of the personalty if its bequest is void; *semble*, also, if the devise of the realty is void and not merely determinable.

By the 3 and 4 Wm. 4, c. 105, a widow's dower is placed wholly at the mercy of the husband. Yet it is not defeated in England even now by a mere bequest,

¹ Dowson v. Bell, 1 Keen, 761.

² Reynolds v. Torin, 1 Russ. 129.

³ Roadley v. Dixon, 3 Russ. 192.

⁴ See Pickering v. Lord Stamford, 3 Ves. 337.

nor by a devise to her of land not liable to her dower. By the English dower act referred to,¹ the widow's dower is subject to all the dispositions in the will, and a devise of the land to another, or of any interest in the land to the widow, absolutely defeats her claim "unless a contrary intention appears" by the will. A devise to the widow of land not liable to dower would seem to preclude her claim to dower, by the terms of the statute. Yet, the contrary seems to have been decided in England. A gift of personalty to the widow does not come within the terms of the act. It gives the widow dower of trust estates as a sort of set-off to the injury done to her dower rights by the general scope of the enactment. In the American States the same rules as to dower apply as in England prior to the act mentioned. Here, therefore, a widow is not entitled to dower of trust estates, unless a local statute provides to the contrary.

Although parol evidence, as a rule, is not admissible to raise a case of election, yet in some instances such evidence has been admitted in America.² Cases of this sort, however, are infirm as general authorities, especially with respect to the reception of parol evidence, the rules for admitting which are daily more and more approximating a scientific shape in America. There has been considerable positive legislation in the various States on the subject of dower.³

¹ §§ 4, 5.

² *Bailey v. Duncan*, 4 Mon. 265, 266.

³ See 1 Jarm. 397, note by Judge Perkins.

CHAPTER XIX.

ELECTION.

The doctrine of election is founded on the principle that a person cannot take a benefit under a will or deed without being bound or estopped by the contents of the whole instrument. The doctrine is acted on in the American courts. Accordingly, if a testator deals with the property of one who is a beneficiary under the will, the beneficiary must either waive the benefit given to him by the will, or else acquiesce in the disposition made of his property by the testator. If he prefers retaining his own property, then equity will appropriate the interest given him in the will, in order to make compensation to the other party.¹

The statements in the will are an estoppel on all the beneficiaries. Therefore, it is not competent for them to show that a child has not received the advancements mentioned in the will, with any view to enlarge the provision made for such child by the will.²

A case of election will not be raised, if it be possible to construe all the provisions in the will to relate to the testator's own property or powers.³ But, any interest, however slight, such as a small annuity given to the heir or next of kin, may put them to their election, in case other provisions of the will are void.⁴ It is not

¹ *Havens v. Sackett*, 15 N. Y. (1 Smith), 365.

² *Painter v. Painter*, 18 Ohio, 247.

³ *Havens v. Sackett*, 15 N. Y. (1 Smith), 365.

⁴ *Arnold v. Gilbert*, 3 Sand. Ch. 531.

material to determine whether the testator was aware that he was raising a case of election or not, provided he had testamentary capacity.

A person electing against a will loses only what is sufficient to compensate the other object of the testator's bounty. The object of the court is not forfeiture, but compensation, to the disappointed beneficiary. The doctrine is, therefore, not very strictly enforced, and a beneficiary may retain his gift, and yet derive property from another who elected against the will. The doctrine, too, does not apply to creditors.¹

Parol evidence is not admissible to prove a case of election. It must, if available, appear on the face of the will² in clear terms. Therefore, a mere general devise of land, even if the testator had no such property, never raises a case of election.³ If there is a reference to lands at a particular locality, of course, the case is different. Where wills of realty speak only from the death of the testator, a general devise of land is still less potent to raise a case of election than where wills of land speak from their date. For, as the testator may buy lands after making his will, and these may pass by it, it is not clear that he intends to convey any property not his own. But this is the assumption of fact on which the doctrine of election rests.

If a foreign heir seeks part of the personalty, he will get it by the testator's domiciliary law, without incurring any peculiar obligation which his own law would impose on him as heir.⁴ Conversely, if he seeks to shift any special charge from his land to the general

¹ *Kidney v. Coussmaker*, 12 Ves. 136.

² *Story Eq. Jur.* § 1092, and note; see *Hapgood v. Houghton*, 22 Pick. 480; *supra*, Part I, 171.

³ *Doe d. Chichester*, 4 Dow, 76.

⁴ *Balfour v. Scott*, cited in 5 Ves. 750; 2 Ves. & B. 131.

personalty, he will fail in such claim.¹ The reasoning of Sir Wm. Grant as to these two different questions, however, is not satisfactory. All the liabilities of the general personalty of the deceased, it would seem, should, in principle, be admitted by the administering court. The general personalty is as much the property of the creditors of the deceased as it is of his next of kin. The question whether the land is in or out of the jurisdiction ought not be deemed to affect this liability of the personalty in the court of administration. However, the cases cited would probably be followed in America.

In *Hunter v. Bryant*,² a devise to testator's wife was, under the particular circumstances of the will, taken to be in satisfaction of a bond given to her before marriage, but subject to her election between the bond and the devise. This privilege of electing was also held to have passed to her devisee.

A daughter, owning a lot subject to her mother's life estate in a third of it, directed her executors to lease all her real estate, and pay annuities to her mother and others out of the rents. It was held that the mother was not compelled to elect, but took the annuity in addition to her own estate, though it might be otherwise, if the charge was on the whole lot specifically.³

In *Pinckney v. Pinckney*,⁴ it was held that a legacy to one of the next of kin, "in lieu of all rights she might have in the real or personal estate" of the testator, did not require the legatee to elect between the legacy and her share as next of kin, of a portion of

¹ *Drummond v. Drummond*, cited in 2 Ves. & B. 132.

² 2 Wheat. 32, reversing 3 Wash. C. Ct. 348,

³ *Harrington v. Hughes*, 1 Paige, 569.

⁴ 1 Bradf. 269.

the estate not disposed of by the will, and that she took both. It thus appears that a testator cannot bar his next of kin from a share of his estate by mere words of negation. Consequently, as regards rules of construction, the next of kin are just as much favored as the heir. Both have vested rights which the court will not divest without express words or necessary implication.

The court will elect for an infant. An adult may elect by parol, or by any matter *in pais*. If, however, the person bound by a covenant to convert money into land, or conversely, becomes also entitled to the benefit of the covenant, the property is then "at home," and retains unconverted.¹

In Van Dyke's App.² indeed, the personal estate was given to the daughters, and the real to the sons, but the will was not executed so as to pass real estate. Yet the daughters were compelled to elect. The decision has not much lateral support in the analogous cases, but it has in principle.

In most of the States, the testator must be competent to dispose by will of the property in question, and the will must have been legally executed before a case of election arises, except that a testator having capacity to bequeath personalty, but not realty, may yet raise a case of election as to realty by giving his bequest expressly *on condition* that the legatee acquiesce in the transfer of the realty. Unless the legatee complies with this injunction, he forfeits the whole legacy, and not merely a sufficient part to compensate the disappointed devisee, as happens under a case of election proper. Unless the medium of a condition is resorted to, the beneficiary under the will may, in the case put, keep

¹ Chichester v. Bickerstaff, 2 Vern. 295.

² 60 Penn. St. 480.

the testamentary gift, and yet refuse to part with any property of his own which the testator had not capacity to devise, or did not dispose of by a will appropriately executed. A married woman who executes a power, and tries to put the appointee to an election, by devising away property from him which she is incapacitated from doing by coverture, will fail to raise any case for election. The appointee can retain the gift appointed, and yet refuse to part with his own property.¹ *Semble*, the married woman could not even effectuate her design of an election by imposing any condition on the appointee. Such a condition would be *ultra vires*, and void.

Indeed, the substitution of a condition for an election seems to be altogether technical and contrary to principle. Either the beneficiary ought to be put to his election whether the will was properly executed by a competent person or not, or else a condition ought not to be deemed to overcome the inherent invalidity of the disposition. However, the distinction seems to be well settled by authority.² Any change in the law ought to be perhaps to deem every case of election as one of implied condition. The margin for elections is much narrowed by the statutes which have assimilated the law of wills of realty to that of personalty, and have made realty assets for the payment of debts.³

¹ *Rich v. Cockell*, 9 Ves. 370.

² *Boughton v. Boughton*, 2 Ves. Sen. 12.

³ As to election, see further, *Parsons v. Snook*, 40 Barb. 144; *Sullivan v. Mara*, 43 Barb. 523; *Tobias v. Ketchum*, 32 N. Y. 319; *Havens v. Sackett*, 15 N. Y. 365; *O'Riley v. Nicholson*, 45 Mo. 160; *Storring v. Borren*, 55 Barb. N. Y. 595.

CHAPTER XX.

'VESTING.

§ 1. *Interests in land.*

A vested remainder, according to Fearn's definition, is a remainder that has a present capacity to take effect in possession, if all prior limitations determined. He explains the nature of a vested interest thoroughly and completely, although his reasoning with respect to a limitation to a trustee to preserve contingent remainders is entirely inconsistent with his own definition; inasmuch as a trustee to preserve &c. has no capacity to take the estate, unless the previous limitation determines on a contingency not certain of ever happening. The word "vested" in a will is sometimes construed as denoting possession of property already vested in interest,¹ and a reference to estates "given," vested, or to which the donees were "entitled" may, owing to the context, refer only to estates vesting in possession at the period referred to.² In like manner sums bequeathed to children, not to "vest" until majority, vest at once in interest, though not in possession, until majority.³

In a doubtful case an estate will be more readily construed to be vested than contingent.⁴ For the law

¹ *Berkeley v. Swinburne*, 16 Sim. 275.

² *Kane v. Astor*, 9 N. Y. (5 Seld.) 113.

³ *Thompson v. Thompson*, 28 Barb. 432.

⁴ *Dingley v. Dingley*, 5 Mass. 539; 2 Pick. 469; 4 Pick. 198; 21 Pick. 314; *Eldridge v. Eldridge*, 9 Cush. 516.

favors the vesting of interests.¹ Therefore, remainders and future estates that relate to the determination of prior ones are vested, if there is a present capacity in the ulterior donee to take were there no preceding interest. The phrase "in default of issue," too, means a failure of issue, and does not render a remainder thereon contingent on there never being any such issue or on any such estate not failing by lapse.² Even certain apparent contingencies are not construed to be really such. Thus on a devise to a widow for life, and if she marry again, over, the remainder takes effect, whether she marries or not. The form of such limitations is unimportant, if the intention be to have the remainder vested.

Though a future devise be contingent in terms, yet, if there is a preceding devise covering the whole period before the contingency, the ulterior devisee takes a vested interest, the prior devise being construed as an exception, and not a condition, to his taking. Thus, under a devise of lands to trustees, until A. shall attain twenty-one, and if or when he shall attain that age then to him in fee, here A. takes a vested interest.³ *A fortiori* will the rule prevail, if the prior interest, as in the case cited, is for the benefit of the devisee.

And where a devise standing alone would be contingent, as to A. if he should attain twenty-one, yet, if there is a devise over, if he die under age, or on any other event, this gives him a vested interest at once, as the devise over shows that he was to take an indefeasible interest, if he attained age.⁴

¹ 4 Kent, 5th ed. 202 *et seq.*; *Dingley v. Dingley*, 5 Mass. 535; see *Winslow v. Goodwin*, 7 Met. 362.

² *Doe v. Dacre*, 1 Bros. & Pull. 250; *Bates v. Webb*, 8 Mass. 458; *Ferson v. Dodge*, 23 Pick. 287.

³ *Edward v. Symonds*, 6 Taunt. 213.

⁴ *Peyton v. Bury*, 2 P. W. 626.

If there be a devise to trustees in trust to convey, yet, the rule in *Peyton v. Bury*¹ will be adopted, although executory limitations are generally to be construed with much care. The context in all these cases is to be studied with attention, and any express declaration or condition as to the period of vesting will, of course, put all implied rules to silence.² A devise after payment of debts, however, does not postpone the vesting.³

But the period of possession or of a division (when such is to be made) is often coincident with the period of vesting, which it postpones.⁴ So, if the testator erroneously supposes that he has no power to dispose of the estate, except on the contingency plainly indicated in his will, his error of law or fact does not prevent the devise from being contingent.

A contingency affecting a particular estate will, of course, sometimes affect the whole series of remainders. But if these are substantive gifts, or if there is any point of substantial contrast between the preceding estate and the ulterior ones, these will not be deemed affected with the contingent nature of the previous estate.⁵ Nor will a vested estate be divested, unless all the conditions and contingencies affecting the ulterior divesting estate are fulfilled.⁶

The courts in the United States incline to the vesting both of devises and bequests.⁷ Yet a remainder will not be deemed vested during the currency of the particular estate, if the testator has disposed of the in-

¹ 2 P. Wms. 626.

² *Glanvil v. Glanvil*, 2 Mer. 38.

³ *Barnardiston v. Carter*, 1 P. W. 505.

⁴ See 4 Kent, 5th ed. 206.

⁵ *Lethiellier v. Tracy*, 3 Atk. 774.

⁶ *Hornes v. Herring*, 1 McCle. & You. 295.

⁷ *Kane v. Aston*, 5 Sandf. 467.

terest or dividends only for a particular purpose,¹ The general rule is, that remainders (if not contingent in their own nature), vest in interest at the same time as the first estate vests in possession. A gift to persons living at a certain period is, however, contingent as to the persons who will be beneficiaries.² But a substitutional gift to children in place of their parents dying before the period of distribution is vested,³ and a bequest to a person when he should attain a specified age, with a direction to apply the interest, meantime, to his education is vested.⁴ In *Converse v. Kellogg*,⁵ it was held that under a devise of "all the residue of my estate to my children," naming them, "and to the descendants of such of them as shall have died in equal portions, but not to be divided until ten years after the death of my wife," the children or their descendants, took present vested interests on the death of the testator.

§ 2. *Future vested gifts of land.*

As the courts incline to regarding limitations as vested⁶ and conditions as subsequent if the context is at all doubtful, therefore, a devise to A. *when*, (but not if), he attains a given age, and, meantime, to B., gives to A. a vested estate, and to B. a term.⁷ Even if there is a limitation over in case A. die under the specified age, his interest, nevertheless, will be vested. The courts will deem an interest in land vested where they would hold a similar gift of personalty contingent by reason of the whole of the interest not being given meantime.⁸

¹ *Drake v. Pell*, 3 Edw. 251.

² *Phelps v. Phelps*, 28 Barb. 121

³ *Beekman v. Schermerhorn*, 3 Sandf. Ch. 181.

⁴ *Burrill v. Sheil*, 2 Barb. 457.

⁵ 7 Barb. 590.

⁶ *Ferson v. Dodge*, 23 Pick. 287.

⁷ *Boraston's Case*, 3 Co. 21, a, b; *Winslow v. Goodwin*, 7 Met. 363.

⁸ *James v. Lord Wynford*, 1 Sm. & G. 40.

Sometimes, indeed, if there is no preceding interest, or if the word "if" and not "when" be used, the devise will be deemed contingent, unless there is a gift over, in the event of the donee dying under the specified age. Under such a context he will take a vested interest, unless the condition is imported into the description of him in the will, as if the devise be to such of the children of A. as shall attain twenty-one.

If a precedent estate determines by lapse, the ulterior vested interest then takes effect in possession.¹ Boraston's case,² has been followed in various decisions in the United States.³ But if there is a devise over to others of the same class, in case of the first devisee dying under the prescribed age, his estate will be deemed contingent.⁴ This seems to be the more natural construction.

In *Zeller v. Eckert*,⁵ A. testator devised to his widow until his son should attain fifteen. The widow was held entitled to hold for fifteen years, even though the son died previously.⁶ In *Farmers' Bank v. Hoof*,⁷ A. devised to his wife during widowhood, but in case she should marry again, then to his daughter and her heirs. The daughter's remainder in fee was held to be vested.⁸

As to vested charges or portions, see *Fuller v.*

¹ See *Gotch v. Foster*, 5 Law Rep. Eq. 311.

² 3 Co. Rep. 19.

³ *Hodgson v. Gemmil*, 5 Rawle, 99; *Cowdin v. Perry*, 11 Pick. 503.
508.

⁴ *Ib.*

⁵ Supreme Ct. 1846, 4 How. 289.

⁶ See further as to vesting, *Walls v. Garrison*, 33 Ga. 341; *Roberts' Appeal*, 59 Pa. St. 70; *McGill's Appeal*, 61 Pa. St. 46; *Kerr v. Bosler*, 62 Pa. St. 183; *Abbott's United States Digest*, Vol. I, 461.

⁷ *Moon v. Stone*, 19 Gratt. (Va.) 130; *Wiggins v. Blount*, 33 Ga. 409; *Buzby's Appeal*, 61 Pa. St. 111; *Pike v. Stephenson*, 99 Mass. 188.

⁸ See *Lovett v. Gillender*, 35 N. Y. 617; *Carmichael v. Carmichael*, 4. Keyes, 346; *Roome v. Phillips*, 24 N. Y. 463.

Winthrop;¹ and as to vested charges, see further *Burrell v. Steill*.²

A vested interest is assignable, devisable, and transmissible on intestacy. An estate vests under a devise before entry. But, of course, a devisee may disclaim.³ To give the devise effect as against the heir, the New York statutes require the will to be proved and recorded in the surrogate's office within four years after the testator's death.⁴ As to the admission of wills of personalty in the State of New York, see also the Revised Statutes.⁵

§ 3. *Vesting of legacies charged on land.*

Legacies charged on land, if not payable until a future date, do not vest prior to that period, even though interest be given in the meantime,⁶ unless the postponement is for the convenience of the estate, as, where there is a preceding life interest.⁷ In such a case the legacy does not sink for the benefit of the inheritance, but is vested and transmissible.

A legacy payable out of both realty and personalty is governed by the rules relating to personalty, so far as the personal estate extends.⁸ Land directed to be sold and terms of years are for this purpose considered to be personalty. But the assets will not be marshaled

¹ 3 Allen, 51; *Lane v. Lane*, 8 Allen, 350.

² 2 Barb. Sup. Ct. 457; *Harris v. Fly*, 7 Paige, 421; *Conklin v. Moore*, 2 Bradf. 179; *Sweet v. Chase*, 2 N. Y. 73.

³ See *Townson v. Tickell*, 3 B. & Ald. 31.

⁴ See Rev. Stat. N. Y. Vol. II, 57-59, as to personal estate.

⁵ Vol. II, 60, 62; *Id.* 66-68, and the Act of 20th April, 1830; 4 Kent Com. 534.

⁶ *Pearce v. Loman*, 3 Ves. 135.

⁷ *Remnant v. Hood*, 2 De G. F. & J. 410.

⁸ *Prowse v. Abingdon*, 1 Atk. 482.

for the legatee.¹ However, the rule in *Pearce v. Lowman* would probably not be followed in the United States.

A legacy to one when he attains age is often construed as vested, though no interest is payable meantime,² especially if there is a limitation over, in case of lapse or some other contingency.³ Where a sum is to be raised within a certain period, it is vested at once, the period specified being only the major limit of the time for raising the sum, unless the testator's interest is reversionary.⁴

Bequests are governed by the same general principles, as to vesting, as devises, although limitations of the two kinds of property are not always construed in the same way.⁵ Pecuniary legacies charged on land, however, are construed as if dispositions of realty.

A legacy to a person *in esse* simply is vested on the death of the testator. A legacy to him at a future date, as when he attains age, is not vested until that period, even though interest meantime be given for his maintenance, unless the future date relates to the estate, as if it be after the determination of a prior particular estate.⁶ The distinction is obvious; in the one case the contingency relates to the person of the donee; in the other, to the subject-matter of the gift. If interest is given meantime, however, it will, in the United States, be held to be vested.⁷

If the legacy is payable out of a future sale of land,

¹ *Pearce v. Lowman*, 3 Ves. 135.

² *Caldwell v. Kinkad*, 1 B. Mon. 231; *Lister v. Bradley*, 1 Hare, 10.

³ *Lowther v. Condon*, 2 Atk. 130.

⁴ See *Bowker v. Bowker*, 2 Cush. 219.

⁵ See *Ferson v. Dodge*, 23 Pick. 287.

⁶ *Birdsall v. Hewett*, 1 Paige, 32; *Childs v. Russell*, 11 Met. 16.

⁷ *Gifford v. Thorn*, 1 Stockt. N. J. 702.

to be made on the death or marriage of the devisee, the legacy is vested, the postponement being for the convenience of the estate.¹

In *Bowker v. Bowker*,² after a devise upon condition that the devisee pay \$100 annually for seven years to his brother, the brother died before the seven years elapsed, yet his executors were held entitled to receive the annuity for the rest of the seven years.

§ 4. *Vesting of personal legacies.*

In the civil law, the term vested means unconditional and transmissible, while non-transmissible or conditional interests were termed contingent. But, in our law, a contingent interest is not always intransmissible. The term vested, with us, means a certain interest in a certain person. The term contingent, on the other hand, denotes that either the person or event on which the gift depends is uncertain ever to exist. The former class of interests is saleable, although the actual possession of the property may be deferred. When the donee is uncertain, however, it is clear that the interest is unsaleable. If it is limited at a remote period, therefore, it may keep property out of commerce and be a perpetuity, unless it is a remainder at common law, and, as such, destructible by the preceding tenant of a vested freehold.

It is generally considered that if a legacy is given to A. at twenty-one, or to be paid to A. at twenty-one, it does not vest till payable. But, if given to A. to be paid to him at twenty-one, it is vested at once. This distinction has been followed in the United States,³ and

¹ *Sharpsteen v. Tillon*, 3 Cow. 651.

² 9 Cush. 519.

³ *Marsh v. Wheeler*, 2 Edw. Ch. 156; *Kihler v. Whitman*, 2 Har. 401.

so much importance has been attached to the insertion of the word "payable," that a legacy to one "if he shall arrive at the age of twenty-one years, then to be paid over to him by my executor" is not a contingent, but a vested legacy.¹

It is often, indeed, very difficult to determine whether the futurity is of the substance of the gift or merely of the time of payment. Division at a future period, however, does not, more than payment, at such a time suspend the vesting.

But, if the payment or distribution depends on a contingency, as marriage with consent, this will render the legacy contingent,² and, in case the legatee dies without fulfilment of the condition, the legacy is not transmitted. A gift of interest, unless it be of a portion of such proceeds for maintenance, is almost conclusive evidence that an immediate vesting was intended by the testator. But, a direction that the interest shall be added to the principal until the legatee attains age does not suspend the vesting.³

A bequest to A. "upon," or "at," or "when," or "if" he attain a given age, or on his marriage, is contingent. A like rule applies to a gift to a class.⁴ The question in such cases usually is whether the gift and time of payment are distinct. If they are, then, as each clause in a will is to have some operation, the gift is deemed to be vested at once⁵—due at once and payable at a future time—especially if interest is given meantime.⁶

¹ *Furness v. Fox*, 1 Cush. 134; see *Eldridge v. Eldridge*, 9 Cush. 516.

² *Atkins v. Hiccocks*, 1 Atk. 500.

³ *Stretch v. Watkins*, 1 Madd. 253.

⁴ *Leake v. Robinson*, 2 Mer. 363.

⁵ *Paterson v. Ellis*, 11 Wend. 259; *Turk, ex parte*, 1 Bradf. 154.

⁶ 6 Ves. 249; *Van Wyck v. Bloodgood*, 1 Bradf. 154.

In *Southern v. Wallaston*,¹ however, the gift was to such of the children of A. as should attain twenty-five, with interest meantime, and the bequests were held to be contingent. For, accumulation is only one ground for presuming that the legacy to which it relates is vested; and this implication may be outweighed by the context.²

The period of actual payment will confine the vesting of a bequest made to the children of A. "when the youngest child attains twenty-one," to such of the children as shall attain that age.³ They or their representatives, and not any dying under twenty-one, will participate. This case of *Leeming v. Sherratt* seems weak in point of principle. The youngest child was probably fixed upon by the testator merely in order to prevent a premature division, and not as impliedly imposing a condition on the vesting or transmissibility of any of the children's shares. Yet, the decision has been followed by several others, and the case of *Cooper v. Cooper*⁴ is not any real authority to the contrary, as the children in that case were enumerated by name. Requiring a legatee to prove his identity within a specified time in no way affects the vesting.⁵ Neither does the legacy become contingent because it cannot vest in possession during the life of the legatee.⁶

A gift of interest subject to a charge does not prevent the principal from vesting;⁷ *aliter*, if the gift of interest is itself contingent or dependent as to its quan-

¹ 16 B. 166.

² *Lyman v. Parsons*, 28 Barb. 564.

³ *Hawkins on Wills*, 233; *Leeming v. Sherratt*, 2 Hare, 14.

⁴ 29 B. 229.

⁵ *Ennis v. Penty*, 3 Bradf. 383.

⁶ *Sweet v. Chase*, 2 N. Y. 73.

⁷ *Jones v. McIlwain*, 1 Russ. 220.

tity on the discretion of a trustee,¹ unless there is a trust for its accumulation.

As to vested legacies see further Bowman's Appeal.²

The courts lean much to the vesting of residuary bequests in order to prevent intestacy. Yet, a residuary bequest to the children, or to such children as shall attain twenty-one, is obviously contingent. A contingent interest, however, is transmissible, when the contingency does not relate to the person of the donee, but to some other person, or thing, or to the subject matter of the gift.³

A legacy to a church, if C. continues to be its pastor for seven years, but if not, to C. with interest, is given on a condition precedent, and vests in C. on his retiring from the church with consent of the congregation.⁴ But, a devise to children, "if they should come of age," gives them no right of immediate possession, and the property meantime goes to the heir.⁵ A condition, however, is often virtually a mere specification of the time when the interest shall vest in possession.⁶ In *Brownson v. Gifford*⁷ it was held that a devise to a married woman, with a provision that if her husband advanced any claim against the testator's estate, the gift should be void, was merely a condition subsequent.

Wills of personalty, it is to be remembered, are construed according to the rules of the civil law. But wills of

¹ *Palsford v. Hunter*, 3 Rev. C. C. 416.

² 34 Penn. St. 19; *Barker v. Woods*, 1 Sand. Ch. 129; *Pinney v. Fancher*, 3 Bradf. 198; *ex parte Turk*, 1 Bradf. 110; *Adams v. Beekman*, 1 Paige, 631.

³ *Wilson v. Bayley*, 3 B. P. C. Toml. ed. 135.

⁴ *Caw v. Robertson*, 5 N. Y. (1 Seld.) 125.

⁵ *Jackson v. Winnie*, 7 Wend. 47.

⁶ *Crosby v. Wendell*, 6 Paige, 548.

⁷ 8 How. Pr. 92.

realty are interpreted more in conformity with the common law. As to contingent bequests of personalty see further *Nash v. Culter*.¹ If the legacies be given to a class, however, it is thought that the American courts incline to postpone the period of vesting until the time appointed for payment, especially if they are charged on land.²

¹ 16 Pick. 491; *Boone v. Dyke's Legatees*, 3 Mon. 529; *Emerson v. Culter*, 14 Pick. 108; *Bateman v. Gray*, Law Rep. 6 Eq. 215; *Furness v. Fox*, 1 Cush. 134; *Trustees of Smith's Charities v. Northampton*, 10 Allen, 498.

² See *Hawkins v. Everett*, 5 Jones, Eq. 42; 2 Redfield, 243; *Cooper v. Cooper*, 7. Jur. N. S. 178; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Wessenger v. Hunt*, 9 Rich. Eq. 459.

CHAPTER XXI.

CONDITIONS.

§ 1. *Their nature and incidents.*

Rules of law are often confounded with rules of construction. Yet there is a patent difference between them. In deeds some rules of construction are rules of law. The rule in Shelley's case, for instance, is a rule of law in a deed; so is the rule that, under a limitation to one and his heirs, the donee takes a fee simple, or, under a limitation to him and the heirs of his body, an estate tail. These rules of construction are so cogent that any clause to the contrary is void. Therefore, a condition that a tenant in fee shall not alien, or that a tenant in tail shall not disentail the land, is void. This rule applies whether the limitation be in a deed or a will. The legal incidents of estates are of their very essence, and cannot be eliminated from the gifts. Such a restriction would amount to saying, you shall and you shall not have the property. But, in wills there is always the preliminary question of construction. A testator cannot, indeed, as to the estate limited, give absolute property without certain consequences attached thereto, as liability to debts, dower, curtesy, &c. But the question under a will must first be determined, whether the absolute property is given or not; and, if it is fettered with certain restrictions inconsistent with an absolute interest, the courts may cut down the absolute gift, instead of eliminating the incongruous inci-

dents, as would be done if the document were a deed. Rules of law, then, are applicable to wills. But their application depends on rules of construction, which, unlike the case of a deed, are as varied as the sentiments expressed by different testators.

A condition was a common-law mode of defeating, but not for transferring, an estate. For instance, if land was given to A. and his heirs, on condition that A. should pay a yearly rent to the grantor, or attend at the county court, with power of re-entry to the grantor on breach of the condition, A.'s estate would be defeated by such entry for a breach of the condition. Rents, though not conditions, be it remembered, can be reserved on alienations in fee even since the statute *Quia emptores*. The only effect of that act is, that no tenant in fee can make himself a lord of a manor, or reserve any tenure to himself from his grantee in fee. But, as a rent may be given in fee to a stranger, so may it be reserved by one who has parted with his reversion. Yet, he cannot by reserving a clause of re-entry, resume his old estate on breach of a condition for payment of the rent.

Neither can a condition on a deed transfer an estate. It is only the grantor or his heir who can take advantage of it. Therefore, at common law, on a grant in fee to A. and his heirs, on condition that if B. returned from Rome, A.'s estate should pass to him or to C., this condition is void. But, in a will, this condition is good. The ulterior estate is thus a shifting use or executory devise. It is no matter how a condition is worded in a will, effect will be sought to be given to it, in this or some other way, if the condition be itself legal. Accordingly, conditions subsequent in wills are usually construed to be conditional limitations.

No precise form of words being necessary to con-

stitute¹ a condition² or, indeed, any limitation in a will, a devise to A., "he paying \$1,000 within a month after my decease," imports a condition. Only the grantor or heir could enter for a condition broken at common law, and when an entry was thus made, it defeated all *puisne* grants by the tenant. Therefore, a release of a condition for once operated to destroy it wholly, else, on a second breach without license, the grantor entering would defeat the estate to the creation of which he had assented by his license. In a will there may be a limitation over on breach of a condition. But such a limitation would be void in a deed operating at common law and not by way of use. When contained in an instrument of the latter description, it is termed a shifting use; in a will it is called an executory devise or conditional limitation. Conditions of re-entry in deeds are very useful, as they enable the grantor to defeat the conveyance wholly, and not merely to have a receiver appointed. Accordingly, such conditions are very common in leases.

If a forfeiture of a legacy is inflicted upon the legatee, if he do not comply with the testator's injunctions, yet, if the legacy be not given over, the threat will be deemed to be *in terrorem* only, and not as concluding the rights of the parties.³ It is strange that the doctrine that a condition is merely *in terrorem* and void was ever adopted by the courts. Lord Cranworth in *Dickson's trust*⁴ said that no condition should be deemed *in terrorem*. But, this dictum is opposed to numerous decided cases.

¹ Part of this chapter has already been published in the Albany Law Journal, Vol. V, p. 145.

² See *Stark v. Smiley*, 25 Maine, 201; 4 Kent, 5 ed. 124; 1 Jarm. 798, note.

³ *Pray v. Belt*, 1 Pet. 670.

⁴ 1 Sim. N. S. 37.

The *in terrorem* doctrine is daily loosing ground. In *Haydyn v. Stoughton*¹ an estate was devised on condition that a school house should be built on the land. The condition was held valid, and the residuary devisee (not the heir at law), was allowed to enter for the breach, twenty years having elapsed from the entry of the devisee.

There is no objection to a devise to one, "if he be a citizen of the United States, and as such capable of holding land at the time of testator's death," but, if not, that the lands be sold and the proceeds given to him.² And yet this condition seems intended to contravene the rule of law forbidding aliens to hold land.

When a condition is annexed to a preceding estate that never arises, a remainder, nevertheless, may take effect. The previous estate in such cases is a limitation, but not itself a condition, in respect to the ulterior interest.³

On a devise to A. for life, remainder to B. in fee, upon condition that, if the rents were not sufficient for the support of A., the deficiency should be supplied by B., the Supreme Court of Massachusetts held that there was no trust created for A., but only a condition, of which the grantor's heir could take advantage.⁴ This decision, with all respect be it said, seems to be worthy of the days of *Perrin v. Blake*.⁵

In *Moore v. Moore*,⁶ there was a clause in a will revoking a devise, on account of the intemperance of the devisee, and directing that unless he should reform, the

¹ 5 Pick. 528.

² Supreme Ct. 1835, *Beard v. Rowan*, 9 Pet. 301; affirming 1 McLean, 135.

³ *Norris v. Beyea*, 13 N. Y. (3 Kern.) 273.

⁴ *Temple v. Nilson*, 4 Met. 568.

⁵ 4 Burr. 2579.

⁶ 47 Barb. 257.

property should be held in trust for three years, to give him time for reformation. The condition was held void, as attempting to create an illegal trust, as suspending the power of alienation illegally, and for uncertainty. The forfeiture being thus held void, the devise took effect simply.

If the beneficiary accept the gift, he is bound by any condition attached thereto.¹ But conditions in wills can only operate by way of election.²

As to conditions, see further *Harris v. Hearne*.³

§ 2. *Classification of conditions.*

Conditions are either express or implied, precedent or subsequent, real or personal, general or special.⁴ Conditions in deeds are also distinguished from limitations in abridging the estate, and from covenants, which only give a claim to damages, and not to an annulling of the grant. But in a will, limitations (for there can be no covenants) and other directions are virtually conditions. The court cannot construe them as covenants, or as giving any claim (except in a case of election), to damages, although a claim in a contract will be more readily construed as a covenant, which may be apportioned, than as a condition. But valid conditions in wills are virtually trusts, and will be as such specifically enforced in equity.

Conditions are most usually classed only as precedent or subsequent.⁵ They either relate to the acquisition of an estate or to its retention. Thus, a devise to A., if

¹ *Runnels v. Runnels*, 27 Texas, 515.

² *Ib.*

³ 1 Winst. Eq. 92; *Gridley v. Gridley*, 24 N. Y. 130.

⁴ Litt, § 325, 328.

⁵ See *Fox v. Phelps*, 17 Wend. 393.

he live to a certain age, and pay to B. a certain sum, imports conditions precedent.¹ If such a condition becomes² impossible, the estate will never vest. It is sometimes difficult to determine whether a condition is precedent or subsequent, but if it is subsequent and impossible, then, the former estate becomes indefeasible.³ As the immediate freehold could not at common law be limited on a contingency, this is perhaps the reason why the courts incline to construe a condition as subsequent rather than as precedent. Yet a stranger cannot take an advantage of the breach of a condition subsequent in a devise.⁴

In *Taylor v. Mason*,⁵ the Supreme Court of the United States held that, if a void condition is precedent, the estate cannot take effect. This doctrine, too, is as old as the common law.

Any consideration exacted from the beneficiary, or any duty imposed on him, unless it is spread over a very unusual period of time, is a condition precedent. Sometimes a condition such as the dying of A. unmarried, is imposed on a limitation to B. In such a case, B.'s estate does not vest during the life of A., as the condition may be determined affirmatively or negatively any time during that period,⁶ and though suspended so long, the condition is precedent. Yet, in *Woodcock v. Woodcock*,⁷ a devise in remainder to A. upon such equivalent as the executors might determine, was held to be subject only to a condition subsequent, as the execu-

¹ *Johnson v. Castle*, 5 Vin. Ab. 343, pl. 41; *Vanhorne v. Dorrance*, 2 Dall. 317.

² *Wells v. Smith*, 2 Edw. 78.

³ *Morrell v. Emery*, 10 Pick. 507.

⁴ *Sup. Ct. 1852, Webster v. Cooper*, 14 How. 488.

⁵ 9 Wend. 350.

⁶ *Randall v. Paine*, 1 B. C. C. 55.

⁷ *Cro. El.* 795.

tors would require time to deliberate in estimating what would be an equivalent consideration.

If the condition is at all capable of being construed as subsequent, it will be deemed to be such. Therefore, a condition to be performed at any time will usually be held to be a subsequent one,¹ as, for instance, a devise to A. to enable him to support B. In *Page v. Hayward*,² lands were devised to A. and B. in case they married a person named S. They married each a person of a different name, yet they were held to take vested interests, the condition being subsequent, and being capable of being performed, as their husbands might die, and they might then marry persons of the coveted name.

As a gift of a legacy, when distinct from the time of payment, implies that it is vested, so, if an interest is distinctly devised, and afterwards made subject to a condition, this implies that the condition is subsequent, as to A. for life, but if she marry without consent, then to B.³

Jarman⁴ infers from the cases that the presumption is in favor of a condition being deemed precedent where it relates, 1, to the raising of a gross sum out of land, and not to a devise of the land itself; 2, where a pecuniary legacy is given, and not a residue; 3, where the act may be performed before the enjoyment of the interest begins; 4, where the condition is capable of being immediately performed; but, 5, that if a certain time is fixed for the performance of the condition, this strengthens the argument in favor of its being subsequent.

A condition of the nature of a consideration is usually deemed precedent.⁵ A condition that the beneficiary shall cease to resort to public houses is a condition

¹ *Finley v. King*, 3 Peters, 376.

² *Lloyd v. Branton*, 3 Mer. 108.

³ *Acherley v. Vernon*, Willis, 153.

² 2 Salk. 570.

⁴ Vol. I, 804.

precedent, and not void for uncertainty.¹ If the condition comprises various acts, all must be performed.² A requirement that the devisee should remain with the testator during his life is a condition precedent, and must be performed.³

It is often hard to determine whether a donee is bound to perform a condition within a reasonable time, or has his whole life to perform it. But, as a rule, the condition should be performed within a reasonable time.⁴ Any condition subsequent to an estate tail may be defeated by the tenant disentailing the land. Jarman⁵ inclines to think that, if the estate is given over, this limitation takes effect if a condition subsequent to a prior estate on which it is itself limited becomes impossible; in other words, he considers that the impossibility of performing a condition subsequent renders the prior estate indefeasible only if there is no limitation over. This opinion he entertains in analogy to the effect of conditions respecting marriage.

The American cases recognize the distinctions between conditions precedent and subsequent and those annexed to realty and to personalty. Accordingly, if an illegal precedent condition be attached to a devise, it will not vest.⁶ The courts, however, latterly incline to hold gifts in restraint of marriage or lawful cohabitation as valid, and the condition alone to be void.

If the condition is subsequent, and the property is given over on non-performance, this may divest the first estate, even if the condition becomes impossible.⁷ But

¹ See *West v. Moore*, 37 Miss. 114.

² *Moakley v. Riggs*, 19 Johns. 71, 72.

³ *Den v. Messenger*, 33 N. J. L. (4 Vr) 499.

⁴ *Ross v. Tremaine*, 2 Met. 425.

⁵ Vol. I, 808.

⁶ 2 Greenl. Cruise, 16; see *Maddox v. Maddox*, 11 Gratt. 804.

⁷ *Graydon v. Picks*, 2 Atk. 16.

if the impossibility is owing to the act of the grantor, the condition is thereby avoided.¹

In *Taylor v. Mason*,² a condition that the devisee should take an oath that he would make no change in the property during his life was held, under the terms of the will, to be a condition subsequent and to be repugnant to the nature of the estate previously granted. It was therefore void.

§ 3. *Conditions in restraint of alienation.*

Conditions that are repugnant to the nature of a gift are absolutely void.³ There is, consequently, much ground for contending that any condition against alienation, where the condition is not attached to a reversion or other assignable interest, is void entirely, and not merely beyond the line of perpetuity, unless there is a limitation over. The nature of the condition is then reversed. For, it operates to assign instead of preventing the assignment of property.

A condition contrary to a plain rule of law is admittedly void. Therefore, if land be devised to A. in fee, but with a condition that he shall not alien or subject to debts, this condition is void.⁴ Even a condition not to alien by any mode not tortious and allowed by law is invalid. But a condition not to assign to a particular person or use as in⁵ mortmain is valid, for the same reason that a condition in partial restraint of contract is good, though a contract or condition in general restraint of future transfer or dealing is void.

¹ *United States v. Arredondo*, 6 Pet. U. S. 691, 745.

² 9 Wheat. 325.

³ *Stockton v. Turner*, 7 J. J. Marsh. 192.

⁴ *Hall v. Tufts*, 18 Pick. 455; *Newkirk v. Newkirk*, 2 Caines, 345; *Bramhill v. Ferris*, 4 Kern. (N. Y.) 44.

⁵ *McWilliams v. Nisley*, 2 Serg. & R. 513.

Conditions evidently come within the reason of the rule against perpetuities. Another reason why a restraint on the alienation of property is often deemed to be void, is, that it is incongruous and inconsistent with the gift itself. A condition, as such, operates, like a future use, to keep property out of the market, because the person who imposed the condition, or his heir, to whom the condition descends, can alone release it, and only to his grantee. There is no person always *in esse* beyond the perpetuity period who can launch the estate on the market, if the condition goes beyond the line of perpetuities. But, as a reversion is assignable, so is its accessory, or the right to the condition. Therefore, since the statute *Quia Emptores*, *semble*, no condition can be reserved on a grant in fee.

The authorities, however, differ respecting the validity of a condition against alienation annexed to an estate in fee. In *Rockford v. Hackman*,¹ the condition was held void. Kent considers² that the condition is good. Leases for years often contain such conditions, and there seems to be no valid reason, therefore, why leases for life should not be subjected to a similar restriction. But, of course, a condition not to assign, imposed on a tenant in fee is altogether repugnant to the estate, and also void as a perpetuity. A condition against alienation even within the line of perpetuity seems void if attached to a fee. Such conditions, when imposed on lessees, are assignable, because the reversions in which they inhere are assignable. But where there is no reversion, land is made inalienable in the case put. The condition, therefore, is, in point of principle, void. The case is different from a settlement of property in which

¹ 10 Eng. L. & Eq. 64.

² 4 Comm. 131.

the tenant for life can alien his own interest; but here is property sought to be rendered wholly inalienable for a certain period.

Such a restriction is inconsistent with the incidents of property,¹ even though it do not violate the rule against perpetuities. It is equivalent to an inalienable use or trust for a man, which is void both at law and in equity. Suspending the vesting of an interest is an entirely different thing. The particular tenants, in the latter case, may meantime dispose of their own interests, and even the contingent remainder-man, or *cestuy que use*, has a right which is assignable in equity (unless his interest is a bare possibility), even though he cannot give such a title to the fee or absolute property which a court of equity would force upon an unwilling purchaser. The case of *Pierce v. Win*,² therefore, is inconsistent with principle, and does not seem to derive much support from the later authorities.

In *Jackson v. Schutz*, however, it was held that a condition against alienation, without the consent of the grantor and offering him pre-emption, was valid in a grant of a fee.³

In *Simonds v. Simonds*,⁴ too, it was considered that a devise to one son in fee, on condition of his not aliening during the life of the other was valid. In *Timothy v. Camp*,⁵ a condition against alienation before the devisee was thirty-five years old, was held to be void. The same restriction in *Stewart v. Brady*,⁶ was held to be

¹ *Gleason v. Fayerweather*, 4 Gray, 348, 351; *Blackstone Bank v. Davis*, 21 Pick. 42; *McWilliams v. Nisly*, 2 Serg. & R. 507.

² 1 Vent. 321.

³ 7 Johns. 227; 18 Johns. 174; see *McWilliams v. Nisly*, 2 Serg. & R. 507.

⁴ 3 Met. 562.

⁵ 1 Phil. Eq. 61.

⁶ 3 Bush. 623.

valid. The former decision is alone in accordance with principle.¹

A devise to testator's children only in case they continued inhabitants of a certain place, was held, in *Newkirk v. Newkirk*,² to be void. Such a general restraint against a change of domicile, is doubtless unreasonable and void. It is to some extent equivalent to a condition against alienation, for if the devisees are required to live on a certain estate, they are not likely to sell it. Yet, such a qualification in the early reports seems to have been deemed good.

In *Gray v. Blanchard*,³ a condition that no window should be made in a certain wall was held valid, but a condition that the house should have no window, it was said by the court, would be void. The condition in this case seems to be repugnant to the nature of the grant, and, therefore, to be void.

Jarman thinks,⁴ that a condition imposed upon a devisee in fee, not to assign except to a particular person is valid. But such a condition is evidently void on principle, as it must operate in general restraint of trade in land, and be a kind of perpetuity. A condition against marrying any one but A. B. is doubtless void. In the case of *Pierce v. Win*,⁵ the condition was confined to a life in being, which the analogy of separate estate tended to support.

To take the converse case, Kent⁶ thinks that a condition not to assign to a particular person is unsound in principle. But the legality of a partial condition in restraint of trade, as of marriage, seems to be rather a consequence of freedom than an impediment to it, for a partial condition implies a consideration, or motive of some

¹ 3 Bush. 323.

² 8 Pick. 284.

³ 1 Vent. 321.

⁴ 2 Caines, 345.

⁵ Vol. I. 814.

⁶ 4 Com. 131.

reasonable kind. Therefore, if A. devises to B. on condition that he is not to sell to C., it is likely A. has some reasonable cause for disliking C. But A. would be an enemy of the human race if he forbade alienation to every one. The authority of Kent,¹ as of Jarman, however, is very likely to weigh with our courts quite as much as if it was a judicial decision. I, therefore, take the liberty of impugning boldly any of their positions that seem unsound. Were I even to prove my views conclusively, I could hardly detract from the general merits of these authors, particularly from the philosophical value of the commentaries.

A personal inalienable trust for men or unmarried females, is void by the law of England and the United States. But a life interest may be made to cease on alienation either voluntarily or by act of law².

Conditions are not favored at law; and still less in equity, because they operate as forfeitures. Yet, they tend to consolidate tenures and titles—an object which the common law endeavored to effect by various means, such as the presumption of a joint tenancy, with the right of accruer, and the rule in Shelley's case. Conditions, however, were of a divesting nature, and the law leans to the vesting of interests, and to their continuance when vested. Conditions, too, are not as flexible as uses, and, accordingly, those old levers of the common law are now in most cases construed in wills, as operating by way of contingent use.

§ 4. *Other void conditions.*

A condition against aliening the subject-matter of any absolute bequest or devise not a separate use, as a

¹ 4 Com. 131.

² See *Stevens v. James*, 4 Sim. 499; see *infra* c. 26, § 4.

general rule, is void, and so is any interest limited on breach of such void condition.¹ A condition against charging with debts any interest absolute or limited is also void. So is a condition that the property is not to be liable to be sequestered in case of bankruptcy.² Yet a disposition to A. until he becomes bankrupt, and then over, is valid.³

But neither a life estate nor an absolute one can be given without power of alienation, unless the gift is worded in the manner already described.

It has, indeed, been repeatedly held in the American States that general restraints on alienation are illegal if they extend beyond the line of perpetuity.⁴ Yet it seems that a trust for a person and his family may be made independent of the creditors of the head of the family. It has been decided in *Bramhall v. Ferris*⁵ that a similar provision might be deemed equally valid, even if there was no trustee. For, the intervention of such in a will seems never to be indispensable to the carrying out of the intention of the testator. Equity never wants a trustee.

In *Bramhall v. Ferris*,⁶ a testator directed his executor to pay the proceeds of his property to his son for life, in order to support his family. It was held that the son's creditors could only attach any surplus that existed beyond what was necessary for the support of the son and his family. This decision was made under the New York statutes. It is wholly at variance with the English rules as regards any interest given to the

¹ *Ross v. Ross*, 1 Jac. & W. 154.

² *Bramhall v. Ferris*, 4 Kern. N. Y. 44, 45.

³ *Brandon v. Robinson*, 18 Ves. 429.

⁴ *Newkirk v. Newkirk*, 2 Caines, 345; *Hawley v. Northampton*, 8 Mass.

3, 6.

⁵ 14 N. Y. 41; see *Clute v. Pool*, 8 Paige, 83.

⁶ 4 Kern. N. Y. 41.

son, as distinguished from the shares of his family. For, no trust for the separate use of a man free from the claims of his creditors can be established in English law.¹

But if the trustees have a discretion either to apply the property to the use of the beneficiary in question or to some other purpose, they may thus prevent the creditors from seizing it. This is equivalent to a gift to A. until bankruptcy, or to A. for life, and then, on his bankruptcy, to B.²

If there is a provision in the will prohibiting alienation, insolvency is a breach of that condition, as such an assignment is voluntary; but bankruptcy generally is an assignment *in invitum*, and will not be a breach of a condition against assignment,³ unless the condition is so worded as to include assignments by operation of law, or unless a person can by his own act become a bankrupt under the local law. A condition against assigning a life interest thus appears to be valid in some of the States, though a condition against incumbering it with debts is void, as creditors claim by the *post*, and not by the *per*; in other words, they claim by law, and not through the grantor.

Seemle, though a gift be so worded as to be deemed either a loan or a gift, yet the creditors of the beneficiary can attach it.⁴

§ 5. *Conditions in restraint of marriage.*

Though all conditions in restraint of marriage were void by the civil law, yet our courts recognise the validity of such restrictions if they are not general.⁵ But, though these conditions are not illegal, they may still

¹ See 1 Jarm. 820, *et seq.*

² See *Dommett v. Bedford*, 3 Ves. 149.

³ See 1 Jarm. 828.

⁴ *Williams v. Jones*, 2 Swans. 620.

⁵ *Bullock v. Bennett*, 31 Eng. L. & Eq. 463.

be void, or, at least, ineffectual, unless there is a gift over on breach. If there is not such an ulterior disposition of the property in question, the condition is termed *in terrorem*, or a mere threat.¹ As a condition precedent, however, must be fulfilled, it is not construed *in terrorem*, even though there be no gift over, though even this point is still, perhaps, *sub judice*. These distinctions relate only to bequests of personalty. All conditions relating to devises of land are construed according to the common law, no matter whether the restriction relates to marriage or not.

By the civil law all conditions, whether precedent or subsequent, in restraint of marriage, were void.² But, in English law, a condition for consent to marriage is valid; so is a condition against marrying a particular person, or under a certain age. And a condition that a widow shall not marry again, has been held valid.³ Yet, this condition, being in general restraint of marriage, seems contrary to public policy, and would doubtless be held to be merely *in terrorem*, both in the United States and in England, at the present day.⁴ *Semble*, a condition of consent to marriage, though legal, is inoperative, unless there is a limitation over on breach of the conditions;⁵ and a residuary gift is not a limitation over within the meaning of this rule.

Conditions in restraint of marriage are thus construed in the American States, and if the gift is personalty, they will be held to be *in terrorem*, unless coupled with a limitation over in case of a breach.⁶

¹ 1 Story Eq. Jur. § 287.

² *Parsons v. Winslow*, 6 Mass. 169.

³ Amb. 209.

⁴ See *Binnerman v. Weaver*, 8 Md. 517.

⁵ See *Parsons v. Winslow*, *ut sup.*

⁶ *McIlvain v. Githin*, 3 Whart. 375; 2 Lead. Cas. in Eq. 390, 3rd Am. ed.

In the American States, however, a condition against the re-marriage of a widow is deemed legal.¹ This decision is supported by some old authorities; but, in point of principle, it is clearly a prohibition in general restraint of marriage, which is void in respect of all persons not widows. There is surely no reason why these should be thus restricted more than others.

Conditions precedent to marry with consent, will not be deemed *in terrorem*, even when there is no limitation over on breach, if the legatee takes a gift in the alternative of marrying without consent, or the marriage without consent is only one of two events on either of which the legatee will be entitled to the legacy, or if marriage with consent is confined to minority. Jarman's statement of the law on this point is to this effect² But, in reality, these are cases where there is a limitation on breach, but the same person is the alternative donee, or else the condition enters into the limitation so that it comes under the principle of the *in terrorem* doctrine as applied to conditions subsequent, and which regards a limitation over coupled with the condition as jointly constituting the terms of the gift over. At all events, a legacy given on marriage with consent, without any gift over, will not vest until marriage.

A legacy to a female, if she shall not cohabit with her husband, seems to be void on grounds of public policy. All conditions in restraint of marriage attached to legacies, however, though void by the civil law,³ are good as to land by the common law.⁴ Our

¹ 2 Redfield, 295; Hughes v. Boyd, 2 Sneed. 512; Holmes v. Field, 12 Ill. 424.

² Vol. I. 839.

³ Hoopes v. Dundas, 10 Barr, 75.

⁴ Commonwealth v. Stauffer, 10 Barr, 350.

present law is thus somewhat heterogeneous, but is, on the whole, sensible.

A condition against celibacy is valid. Thus, in *Cooper v. Remsen*,¹ a gift to A. to cease when she became a nun, was held to be legal. All conditions, however, abridging religious liberty, in the American States, where there is no common law or established church, would seem to be, in the main, against constitutional law and the principles of public policy. In *Shackleford v. Hall*,² a condition subsequent in general restraint of marriage, was held to be valid and to divest the estate. Devises in restraint of marriage, without any gift over, are valid in Pennsylvania.³

A devise on condition not to marry except according to Quaker rules was held valid in *Houghton v. Houghton*,⁴ but invalid in *Maddox v. Maddox*.⁵ It seems clear that, on principle, such restrictions are invalid. A restraint against marriage, when extended to whole classes, is evidently unlawful; but, confined to a class, it does not perhaps abridge freedom of choice too much. Therefore, a condition against marrying a Scotchman was held to be valid in *Peirren v. Lyon*.⁶ But a condition to marry none but a Scotchman would seem to be too general, and, as such, void.

If a bequest is made to a legatee at twenty-one, or on marriage with consent, with a clause of forfeiture upon marriage without consent, if the legatee attains twenty-one, the condition is gone.⁷ If a trustee withholds his consent without cause, the court will authorize a marriage without consent. Jarman thinks⁸ the court

¹ 5 Johns. Ch. 459.

² 19 Ill. 212.

³ 2 Redfield, 304.

⁴ 1 Moll. 611.

⁵ 11 Grät. Va. 804.

⁶ 9 East. 179.

⁷ See *Chauncey v. Graydon*, 2 Atk. 616; *Durney v. Schaeffer*, 24 Mo. (3 Jones) 170; *Hughes v. Boyd*, 2 Sneed, Tenn. 512.

⁸ Vol. I. 844.

will not do this, if the consent was to be in writing. But, as a writing is merely the evidence of the consent, and there is a sufficient equity for the court to act *dehors* the document, its requirement would seem not to be material where there was bad faith on the part of the trustee.

A condition in partial restraint of marriage, unless there is a gift over, will not be held void in respect to legacies charged on land, so far as the realty must be resorted to, since the *in terrorem* doctrine is taken from the civil law, and is applicable to personal legacies only. These were formerly administered in the ecclesiastical courts, which adopted the rules of the civil, and not of the common law. But the latter law applies to devises and charges on land.

A condition that a legatee shall not dispute the will is also *in terrorem*, unless there is a gift over. But this doctrine is not applied to devises of land.

Where there was a devise on marrying with consent and a gift over on marrying against consent, the word "against" was read "without."¹

A consent to marriage must be before or at the time of its celebration. If one of the trustees is dead, the consent of the survivors will suffice, while, if the condition is subsequent, it is wholly gone. The consent may be express or implied, and one marriage with consent of testator, or of the trustee, destroys the condition forever afterwards.² This is a general rule of conditions, except so far as the law is altered by statute or judicial construction. If a condition, even at the present day in some of the States, is released once, it is gone for ever.

A general consent is sufficient. But a consent to a marriage with A. is no consent to a marriage with B.

¹ Long v. Ricketts, 2 Sim. & Stu. 179.

² 2 Williams, Ex. 2d Am. ed. p. 914, *et seq.*

A consent once given cannot be retracted. The consent of all the trustees who have acted, or of the survivors, is sufficient.

A condition that the beneficiary shall change his name is fulfilled by his doing so, without compliance with any ceremony that may be required by law for that purpose.

§ 6. *Equitable relief.*

The question of the inter-dependence of covenants in the same instrument is mainly determined by the order of time of their performance.¹ If an estate be limited to A. on his marriage with B., this is a condition precedent.² It is strictly enforced, and equity will hardly relieve against its non-fulfilment. The case of the *City Bank v. Smith*³ is, as the note in Kent alleges,⁴ an authority for holding that equity will relieve in the case of a condition precedent. But the circumstances under which the court will thus exercise its remedial jurisdiction are very rare.⁴

The court, however, will either relieve against a breach of a condition precedent, or interfere to defeat a vested interest, when the condition is intended to secure a sum of money or the performance of any other act, and the loss can be readily made the subject of compensation.⁵

Conditions are apportionable in most of the United States as in England, so far as that a waiver of forfeiture operates only for that occasion, and does not destroy the condition.⁶ Yet, at common law no condition was apportionable.

¹ 4 Kent Com. 125, note.

² *Ib.*

³ 3 Gill & J. 265.

⁴ 4 Kent Com. 125; Story, §§ 1320-26; *Gregory v. Wilson*, 9 Hare, 689; *Thompson v. Hudson*, L. R. 2, Eq. Cas. 612; 2 Ch. App. 255.

⁵ *Flandears v. Lamphear*, 9 N. H. 201.

⁶ See 21 Vict. c. 27. *Supra*, 268.

CHAPTER XXII.

TRUSTS FOR SEPARATE USE.

A trust for the separate use of married women, in respect to which they can act precisely as if they were unmarried, may be created in the American States. But the intention must be very explicit.¹ A trust for her "sole use and benefit," however, is sufficient for this purpose.² So is a trust of "property to remain in her possession," "for her special use and benefit,"³ "for her own use and benefit absolutely,"⁴ "for her own use and at her own disposal," "for her livelihood," "her receipt to be a sufficient discharge," "independently of any other person,"⁵ or, "whether married or single."⁶ But, a gift for separate use is not raised by the use merely of the words "absolutely," "for her own absolute use," or "for her own use and benefit," "to her and the heirs of her body, and them alone,"⁷ "entirely for her and her children," or, "for her own use and benefit."⁸ Neither do the words "own," "proper," or "absolute" use, raise a trust for a separate use.⁹

For phrases that will create a trust for the separate use of a married woman, see the authorities referred to

¹ *Stevenson v. Schriver*, 9 Gill & J. 324.

² *Jarvis v. Prentice*, 19 Conn. 272; see *Jones v. Jones*, 7 Ga. 76.

³ *Freeman v. Flood*, 16 Ga. 528.

⁴ *Tarsey's Trust* L. R. 1 Eq. 561.

⁵ *Lee v. Priaulx*, 3 Bro. C. C. 381.

⁶ See *Shewell v. Dwaris*, Johns. Eng. 172.

⁷ *Foster v. Kerr*, 4 Rich. Eq. 390.

⁸ *Foley v. Foley*, Irish Ch. App. 18 W. R. 81.

⁹ *Rycroft v. Christy*, 3 Beav. 238.

in the note.¹ *Seemle*, any expressions of desire that her husband or his creditors shall not attach the wife's estate will render it separate. The appointment of a trustee for this or any other trust by the testator is unnecessary. For, it is a maxim of equity that it never wants a trustee, and when a trust for a married woman is raised, it will regard the husband as the trustee, if none other is appointed.²

A trust for the separate, inalienable use of a woman on future marriage is valid.³ But, a trust for the use of a man for life, without anticipation, is void. He may assign his life interest, or it will pass to his assignees in bankruptcy.⁴ The American law, however, on this point, is not as rigid as the English.⁵

A gift to husband and wife and a third person, gives the husband and wife only a moiety, and not two-thirds, as husband and wife are only one person in law. This rule applies to land as well as personalty, and whether the limitation be to the donees as joint tenants, or as tenants in common. But, if the gift be to A. (husband) and B. (wife), the limitation, thus worded, will give them a share each, though the wife will not take to her separate use in the equitable sense of that phrase.

¹ Clancy's Rights of Women, Am. ed. p. 262, *et seq.*; *Hamilton v. Bishop*, 8 Yerg. 33; *Hulme v. Tenant*, 1 Br. C. C. 16; s. c. 1 White & Tud. Lead. Cas. and notes thereto, 2d ed. 394, *et seq.*

² 2 Story Eq. Jur. § 1392; *Bradish v. Gibbs*, 3 Johns. Ch. 540.

³ 1 Beav. 34.

⁴ 2 Story Eq. Jur. § 1382.

⁵ See *supra*, chapter XXI, § 3.

CHAPTER XXIII.

GIFTS TO CERTAIN PERSONS AND CLASSES.

§ 1. *Gifts to a class.*

A legacy to a class is often confined by the context to the individuals known to the testator. But if a class is really intended by him, the text writers say that all will participate who answer the description of the class when the gift takes effect in possession—that is, at the period of distribution. This statement, however, proves nothing. The question, is, when does the period of distribution occur. Indeed, gifts to classes are not all construed in the same manner with respect to the period of distribution. Sanders, in his note to *Heathe v. Heathe*, says that, in the case of a gift to children, where the gift is not confined to time, the death of the testator is the period when the members of the class are to be reckoned, but where the distribution is postponed on account of a preceding gift for life or otherwise, then all who are born before the period of distribution take, but not those born afterwards.¹ If, however, the particular tenant dies in the lifetime of the testator, all who are born into the class afterwards, but in the lifetime of the testator, will take.² It is thus plain that in England and in most of the States an immediate gift to “children,” “grandchildren,” “issue,” “brothers,” “sisters,” “cousins,” refers to those in existence at the testator’s death, if there be any such at that period.³ Those who do not survive the testator take nothing⁴ in Eng-

¹ 2 Atk. 121.

² *Carver v. Oakley*, 4 Jones Eq. 85.

³ *Viner v. Francis*, 2 Cox, 190.

⁴ *Devisme v. Mello*, 1 Bro. C. C. 537.

land and most of the States. But if the gift is not immediate, all will take who correspond with the description at or before the period of distribution, or represent those who so correspond. The members of the class take vested interests at the testator's death, *sub modo*, or subject to be partially divested by the appearance of a new member of the class, but not lost by their own decease before the period of distribution. It is then transmitted to their representative.¹

The rules relating to this point, therefore, may be thus summarized:—Gifts to children apply only to those who correspond with the description at the period of distribution. Therefore, immediate gifts extend only to those who can claim to be beneficiaries at the testator's death. But, deferred gifts will be applied in favor of all, or their representatives, who correspond with the description any time after the testator's death and before the period of distribution. Where the shares of children or other members of a class are made payable at twenty-one or marriage, the period of distribution occurs when the contingency first happens. None can take who do not answer the description until afterwards.²

Immediate gifts to children mean those living at the testator's death.³ Deferred gifts include all, or their representatives, born before the period of distribution.⁴ If there is no preceding limitation, but the testator's interest in the subject-matter of the bequest is itself reversionary, the rule in *Oppenheim v. Henry*⁵ still applies, and all who come within the definition of the

¹ *Oppenheim v. Henry*, 10 Hare, 441.

² *Andrews v. Partington*, 3 Bro. C. C. 403; see *Gillman v. Daunt*, 3 K. & J. 48.

³ *Jenkins v. Freyer*, 4 Paige, 47; *Van Hook v. Rogers*, 3 Murph. 178.

⁴ *Haskins v. Tate*, 25 Penn. St. 249; *Carroll v. Hancock*, 3 Jones' Law, (N. C.) 471.

⁵ 10 Hare, 441.

class down to the period of distribution will take. This latter rule, does not apply to a limitation of residue to a class, if only part of the residue be previously given by the will to others for life. The residuary legatees must correspond with the description in the will at the time of testator's death. Gifts *subject* to a term are also considered as immediate.¹

Perkins, J.,² and Redfield, J.,³ lay down the position that, where a legacy is given to a class of individuals, it will take in all who answer the description at the time the gift shall take effect. If by taking effect is meant the period of distribution, this is true only as applied to children, and not to next of kin. If the phrase means the death of the testator, it is not accurate as regards gifts to children, the period of distributing which is deferred. In other words, no general rule can be applied to gifts to classes; since gifts to children, brothers, sisters, nephews, nieces, &c., with respect to the point in question, are construed differently from gifts to other classes of persons.⁴

The rule which gives vested interests only to those persons who come within the definition of a class of beneficiaries at the testator's death applies, though the phrase "all and every" be used. The members still take as a class, and not individually. Of course, if the context means otherwise, the express will of the testator must prevail. Therefore, a gift to "all the children of A. and B. who shall be born during the lifetime of A. and B," comprises all born within the period specified.⁵

When children are substituted for their parents dying before the period of distribution, the children must also survive the period of distribution, else their shares go to those who survive that period. This rule is pe-

¹ Singleton v. Gilbert, 1 Cox, 68.

² 2 Jarm. 73.

³ Vol. II, 10. ⁴ 2 Jarm. 78. ⁵ Scott v. Lord Scarborough, 1 Beav. 154.

culiar to gifts to children. It imports into the substituted gift a condition which is expressly imposed by the testator only on the primary gift. The rule does not apply to other substitutionary legacies. Accruing shares to such are not by necessary implication subject to clauses of accruer imposed by the testator only on the primary shares.

A gift to such issue as a person may leave, points to the time of his death, and those who die before him take nothing.¹ A gift over in case of a prior devisee or legatee dying without children means without leaving children at his death. But "without having children" means without having had a child. The first legatee's interest, in the latter case, becomes indefeasible on the birth of a child.² The phrase "in case A. and B., husband and wife, have no children," means "in case no child survives both parents."³

The rule which postpones the reckoning of the members of a class of beneficiaries until the period of distribution applies only where the whole charge on the testator's estate is not thus increased. Therefore a gift of \$5,000 to all the children of A., payable to them when they attain twenty-one, will let in all children born after the testator's death who are born before the eldest child attains twenty-one. But, a gift of \$100 to each of A.'s children who shall attain twenty-one, will extend only to those answering the description at the testator's death. Else the administration of the testator's personalty should be indefinitely deferred.⁴ For this reason, also, though the payment of legacies is postponed for a year from the date of testator's death, this does not enlarge the class of beneficiaries.⁵

¹ 2 Jarm. 114.

² 2 Jarm. 113.

³ *Doe v. Nasmyth v. Knowles*, 1 Barn. & Adol. 324.

⁴ *Ringrose v. Bramham*, 2 Cox, 384. ⁵ *Hagger v. Payne*, 23 B. 479.



When the first share becomes payable the whole fund must then be distributed, even though there be words of ulterior futurity in the limitation as to "the children of A. born or to be born, as many as there may be." But, the rule which requires the distribution to be made when the first share becomes payable is founded on mere principles of convenience. It is a rule of construction, and not of law, and may be neutralized by a plain clause or context to the contrary,¹ or where the shares are not made payable until the youngest attains twenty-one,² or where the interest is to be applied until they attain twenty-one.³

If there be a gift to A. for life, remainder to the children of B. who attain twenty-one, or to be payable to them at twenty-one, the period of distribution is deferred to the latest of these events, and all who answer the description down to the occurrence of the last contingency will take.⁴

A gift to all "the present born children of A." will still apply only to those who survive the testator.⁵ Even a power to A. to appoint to the children of B. can be exercised only in favor of the children in existence at testator's death.⁶

The rule that a class is to be defined at the period of the testator's death does not apply when there are no persons then answering the description. In such an event, all who correspond with the description any time afterwards (within the bounds of perpetuity), are admitted,⁷ and the interest that accrues until the first

¹ *Iredell v. Iredell*, 25 B. 485.

² *Mainwaring v. Beevor*, 8 Hare, 44.

³ *Armitage v. Williams*, 27 B. 346.

⁴ *Hawkins on Wills*, 77.

⁵ *Leigh v. Leigh*, 17 B. 605; see *Lee v. Pain*, 4 Hare, 250.

⁶ *Paul v. Compton*, 8 Ves. 375.

⁷ *Harrison v. Lloyd*, T. & R. 310.

taker appears falls into the residue. If the gift is a legal contingent remainder, it will, of course, also fail. But the rule applies only to immediate gifts. Where there is a gift, not to a class, but to individuals, and one of these dies before the testator, his share lapses.

It is not yet completely settled in England¹ whether a gift to children "born" or "to be born" will let in children born after the testator's death, or whether the testator merely contemplated the case of the birth of children between the making of his will and the time of his death.² In some cases such children have been admitted.³

It was held in *Kevern v. Williams*,⁴ that under a bequest to A. for life, remainder to the grandchildren of B., payable at their ages of twenty, none could take but those born in A.'s lifetime. The limitation, indeed, would, under any other construction, be void for remoteness.

A bequest of chattels to A., and, if he die without children, over, gives A. the absolute property, subject to an executory interest on the contingency specified.⁵ But, if the gift is to A. for life expressly, the limitation will resemble a devise of land to A. for life, and if he die without issue living at his death, remainder to B. In this case, if A. have issue, there is an intestacy of the subject of bequest after A.'s death. The courts, however, will be astute in discovering in the context some means for implying interests in the children by purchase. The natural mode of interpreting the word issue would seem to be to construe it as a word of purchase, and also as conveying a fee tail. But, it was held at an

¹ Hawkins, 71.

² *Deffis v. Goldschmidt*, 1 Mer. 417; *Mogg v. Mogg*, 1 Mer. 654.

³ Hawkins, 71.

⁴ 5 Sim. 172.

⁵ *Weakley d. Knight v. Rugg*, 7 Durn. & East. 322.

early date to be a word of limitation in wills, and from this construction all the complications resulting from the use of the phrase have been derived.¹

Deferred gifts become all payable on the first vesting in *possession* of any one share. Therefore, gifts to the children of A. on marriage, become distributable when any of A.'s children marries. But, if the gift is to them at twenty-one, only children born before the period of the testator's death can take, otherwise the whole personalty of the testator should remain unadministered. This exception to the general rule as to deferred gifts does not apply when, as already stated, the total amount to be given to the whole class is fixed by the testator.

To A. for life, remainder to the children of B., there being no children of B. born during A.'s life, children of B. born after A.'s death will take, if the limitation is one of personalty, or an equitable trust of realty. But, if it is a legal contingent remainder, it fails,² unless there is a limitation to trustees to preserve, &c., during the life of B.

Therefore, under a gift to children after a life estate, all children living at testator's death, and all born during, but not after, the pendency of the life estate, will participate; but none of those born after the determination of that estate will take, unless there were no children then *in esse*. In this event, all born afterwards will take, unless the limitation is a legal contingent remainder, unsupported by an estate in trustees. The distribution of the fund will not be delayed, nor the class enlarged, because there is a gift over on failure of the whole class.³

Although, if there is, at the time of the testator's death, no person answering the description of the class of

¹ *Ex parte Rogers*, 2 Madd. 449.

² 2 Jarm. 92.

³ *Andrews v. Partington*, 3 B. C. C. 401.

children referred to in the will, all the children born subsequently to the death of the testator will take, yet, the rents, meantime, of the reality will fall to the heir at law, unless there is a general residuary devise. When any child is born, he takes the whole income until another is born, and so on.¹

A gift to children "now living" extends only to those living at the date of the will. But, the word "begotten" has a prospective as well as retrospective force.² The words "to be born" will let in all future children, unless the case be one of a general pecuniary legacy. The same words do not exclude children already born.³ Jarman seems justly to disapprove of this rule.⁴ For the express including of one class of children implies the exclusion of others. *Expressio unius, &c.*

In some American cases,⁵ under a gift to a class, it has been held that none can take but those who were living at the date of the will, while even of these, the shares of any who predecease the testator, will accrue to the others. Judge Redfield⁶ considers that the rule in those States, where the question has been most carefully considered, is to reckon the members of the class "when the gift takes effect." This phrase, he explains afterwards, to mean the period of distribution. Therefore a devise in remainder to a class, will operate only for those (or their representatives), who belong to the class on the death of the particular tenant.⁷

¹ *Shepherd v. Ingram*, Amb. 448.

² 2 Jarm. 102.

³ *Doe d. James v. Hallett*, 1 Mau. & S. 124.

⁴ 2 Jarm. 101.

⁵ *Stires v. Van Rensselaer*, 2 Bradf. 172; *Lawrence v. Hebbard*, 1 Bradf. 252.

⁶ Vol. II, 10; *Hawkins v. Everett*, 5 Jones, Eq. 42; *Walker v. Williamson*, 25 Ga. 549.

⁷ *Kilpatrick v. Johnson*, 15 N. Y. 322; *Myers v. Myers*, 2 McCord Ch. 214, 256.

In *Campbell v. Rawdon*,¹ it was held that a devise in remainder to a class, takes effect at the decease of the testator. *Knight v. Knight*,² however, decides that the class is not to be computed until the death of the particular tenant, if there is one. The members of the class take as tenants in common.³

Where any of a class of legatees are *in esse*, survivorship will generally be construed in America, with reference to the time of the testator's death. A legacy to children, too, then becomes vested in interest in the children then living, but subject to open and admit after born children to a participation.⁴ Under a devise to A.'s "children, their heirs and assigns," the children of such as die before the testator, cannot take, but the children surviving him take the whole, as a class.⁵ A devise to the "surviving children of my late sister A., not knowing their names, they living in the State of Maine, to be divided equally among them all," was held to apply to all living at the date of the will. Any dying before the testator, nevertheless, transmit their interests to their representatives under the Massachusetts statute.⁶

A legacy to grandchildren on their attaining age, or marrying with consent, does not apply to a grandchild already of age and married.⁷ However, in *Collin v. Collin*,⁸ where a fund was given to a class, on their attaining age, those who had attained age at the tes-

¹ 18 N. Y. 412.

² 3 Jones Eq. 167.

³ *Phenes Trusts*, Law Rep. 5 Eq. 346.

⁴ *Mowatt v. Carow*, 7 Paige, 328.

⁵ *Stires v. Van Rensselaer*, 2 Bradf. 172; *Doubleday v. Newton*, 27 Barb. 431; *Tucker v. Bishop*, 16 N. Y. (2 Smith), 402.

⁶ *Morse v. Mason*, 11 Allen, 36.

⁷ *Hone v. Van Schaick*, 3 N. Y. (3 Comst.) 538.

⁸ 1 Barb. Ch. 630.

tator's death were held entitled to an immediate participation. The residue was left to be accumulated until the whole was distributed. This decision is what will be found applicable to the great majority of gifts to a class thus imperfectly described.

As to the period when "children" take vested interests, see further *Conley v. Kincaid*.¹ A posthumous child takes as if born in testator's life time.²

§ 2. *Heirs*.

The meaning of the term "heirs" or "representatives," will, in all cases of doubt, be determined by reference to the statutory definitions of these terms.³ The word "heir," therefore, means the legal heir at the death of the testator. If the law has made a change in heirship, between the date of the will and that of the testator's death, the testator will be presumed to have contemplated the possibility of such change,⁴ and to have used his words accordingly.

Parol evidence is not admissible to vary the meaning of the term heir.⁵

Although the word "heirs" denotes the persons answering that description at the testator's decease, yet if there are intermediate estates, and if the limitation to the heirs is a contingent remainder, the reference will be to persons answering the designation, when the estate vests in possession.⁶

In *Hawn v. Banks*,⁷ the clause "and to her heirs,"

¹ 34 Ala. 203.

² 2 Head. 191; 1 Wins. Eq. 44; *Smith v. Ashurst*, 34 Ala. 208; *Carmichael v. Carmichael*, 2 Head. 191; *Beasley v. Jenkins*, 18 W. R. 129; *Hall v. Wooller*, 41 N. Y. 346; *Stoner v. Berndt*, 10 Penn. St. 213; *Osgood v. Livering*, 33 Me. 464; *Dickinson v. Lee*, 4 Watts, 82; *Van Gieson v. Howard*, 3 Halst. Ch. 462.

³ *Lyon v. Acker*, 33 Conn. 222; *Abbott v. Browning*, 3 Allen, 587.

⁴ *Aspden's Estate*, 2 Wall. Jr. C. Ct. 368.

⁵ *Ib.*

⁶ *Abbott v. Bradstreet*, 3 Allen, 587.

⁷ 4 Edw. 664.

was held to be used in a substitutional sense. This is a very frequent meaning of the word heirs in a will. Probably in those States where a general devise passes a fee, the word "heirs" would be the more readily regarded as substitutional, in accordance with the general principle of interpretation that requires every word in a will to get, if possible, a specific meaning and not to be deemed mere emphatic surplusage.

The term "heirs" means only heirs *de jure*, and not devisees.¹ Conversely, an heir will not take by devise when he may take by descent. For, when a person can claim by act of law as well as by matter *in pais*, he is remitted to his legal title. The courts presume a legal title to be better than a contractual or testamentary one.² This presumption, too, is a conclusive one. A title at common law is also deemed superior to one by statute, and it extinguishes an equitable title when both concur in the same person.

In *Drake v. Pell*,³ legacies were given to children, or if any one should die after the testator, and after attaining age, and before the youngest attained age, then to his heirs, devisees, or legal representatives. It was held that as the property was personal, the term "heirs" and "legal representatives" were synonymous with next of kin, and did not include the executors or administrators; that the word "devisees" gave a power of appointment, and that these were words of purchase. But, although the word "heirs" may thus be a term of purchase,⁴ yet, under a bequest to legatees, or to "their heirs," one of the legatees being dead at the date of the will, it was held that there was no lapse. The property, however, being personal, went

¹ Porter's Appeal, 45 Penn. St. 201; see *Stover v. Berndt*, 10 Penn. St. 213; *Bond's Appeal*, 31 Conn. 183.

² *Barnitz v. Casey*, 7 Cranch. 456.

³ 3 Edw. 251.

⁴ *Murphy v. Harvey*, 4 Edw. 131.

not to the legatee's heirs, but to her next of kin, excluding her husband.¹ In a bequest to "J. and his children, to be equally divided between them and their heirs and assigns forever," the word "heirs" was held to be a term of limitation.² A limitation to "heirs" intended to take during the life of their ancestor, would, in England, be generally confined to mean heir in the singular number.³ But, in America, under such a devise, the next of kin would take.⁴

In *Chambers v. Taylor*,⁵ it was held that a devise to the heir female created only an estate for life. However, under a devise to one's heir, the legal heir usually takes a fee. But, where a division is directed to be made amongst heirs, these mean next of kin.⁶ A grant by deed to A. and his heirs male will not apply to a daughter, but will to a brother,⁷ though neither satisfies both the conditions of the gift, and, if the grant were to the heir general, neither would take. In a will, however, the clause heir male confers an estate in tail male.⁸

An heir male or female by descent must trace title all through heirs of the kind designated. But, *semble*, an heir male or female by purchase is not so strictly bound;⁹ and, therefore, the son of a deceased female may take by purchase under the description of heir male. So, also, under a devise by a testator to the heir male of his body, on his death leaving grandchildren only, the issue of his daughters, the eldest sons of each daughter will take.¹⁰

¹ *Wright v. Method. Epis. Ch. Hoffm.* 202.

² *Armstrong v. Moran*, 1 Bradf. 314.

³ *Janes v. Richardson*, 7 T. Jon. 99; *nom. Burchett v. Durdaunt*, Raym. 330.

⁴ *Simmons v. Garrot*, 1 Dev. & Bat. Eq. 393.

⁵ 2 My. & C. 376; see *Winter v. Peeratt*, 9 Cl. & Fin. 606.

⁶ *Baskin Appeal*, 3 Barr. Penn. 304.

⁷ *Wills v. Palmer*, 5 Burr. 2617.

⁸ *Doe d. Lindsey v. Calyear*, 11 East, 548. ⁹ *Hobart*, 31. ¹⁰ 2 Jarm. 11.

Sir Edward Coke,¹ indeed, considered that an heir male, taking by purchase, must be the heir general and also a male, but need not make out descent through males; in other words, Sir Edward thought that the clause in question did not denote an estate in tail male. This doctrine, however, has been expressly overruled as regards limitations to heirs male *of the body*, taking by purchase, that is, where the ancestor takes no estate. The clause now confers an estate tail to which title can be only traced through males. Lord Coke's position would still probably be followed in the case of a limitation to "heir male"² in a deed. But in a will this clause also confers an estate in tail male.³

According to Coke, then, the heir male of the body taking by purchase should be heir general, but need not trace title through males. By the present law "the heir male" under a will must trace title through males, though he need not be heir general, but only heir in tail male.

A "male descendant,"⁴ too, or an "eldest male lineal descendant"⁵ must claim title through males only.

Under a devise to the right heirs of A., being of the name of B., no person can claim, except one who is both heir general of A. and also of the name of B.⁶ In the case cited, Parke, J., considered that the doctrine of Lord Coke, that an heir male need not be heir general, was overruled only as to estates tail. The limitation in question, however, in a deed has no special force. It is only equivalent to a limitation to the heir. It is only under a will, therefore, that the question can arise. The testator must mean a person to be his heir general and

¹ Co. Lit. 246.

² Wills v. Palmer, 5 Burr. 2615.

³ Doe d. Angell v. Angell, 9 Q. B. 328.

⁴ Bernal v. Bernal, 3 My. & Cr. 559.

⁵ Oddie v. Woodford, 7 H. L. C. 429.

⁶ Wrightson v. Macauley, 14 M. & W. 214.

also a male, else the law will deem the heir male to be a tenant in tail male.

A devise to A. for life, remainder to the heir male of his body, and to the heirs male of the body of such heir male, gives A. only an estate for life.¹

In *Chamberlayne v. Chamberlayne*,² the rule in *Archer's* case was applied to a devise to A., to hold to him and the heir male of his body, and the heirs and assigns of such heir male, although in a deed the *habendum* alone properly contains the limitation of estate, and the word assigns is in all such cases inoperative, though it is of use in certain covenants. The rule in *Archer's* case, indeed, is sound; but, then, its application, as in *Chamberlayne v. Chamberlayne* is generally inconsistent with a host of authorities in which the rule in *Shelley's* case has been adopted.

Under a devise to A. and his heirs, and to B., who is one of the heirs of A., B. takes as devisee and also as heir.³

In New York, where the rule in *Shelley's* case has been abolished, under a devise to A. for life and after his death to his heirs, the heirs take a contingent remainder by purchase.

In *Heard v. Horton*,⁴ a distinction was taken between a devise to the heirs of one who is stated in the will to be now living, and a devise to his heirs without any statement as to his being either alive or dead. The court inclined to hold the latter devise void, though the former would be held to apply to those who where the heirs specified at the date of the will. The distinction, however, appears rather nebulous, and to be fit only for the elementary stages of jurisprudence, when *cy pres* or liberal constructions are rare.

¹ *Archer's Case*, 1 Rep. 66.

² 6 Ell. & Bl. 625.

³ *Stowe v. Ward*, 1 Dev. 67; s. c. 3 Hawks, 604; see *supra*, c. VI.

⁴ 1 Denio, 165.

A devise to A. and his heirs lawfully begotten,¹ gives A. an estate tail. A devise to A. and his lawful heirs gives him a fee. A devise to A. and his heirs, and, if he die without issue or heirs of his body, then over, gives A. only an estate tail.² Even in a deed, a limitation to one and his heirs in the premises may be reduced by an *habendum* to him and the heirs of his body to an entail: *A fortiori* may a later clause in a will control a prior one of the same genus. But, if the gift over be on a failure of issue, at a date within a life or lives in being, and twenty-one years after, A. takes a fee subject to an executory devise.³

If land be devised to B. alone, or with others, on failure of A.'s heirs, and B. is capable of being heir to A.,⁴ then A. takes by implication only an estate tail. For, every word in a will must receive a meaning, unless the context or the primary intention of the testator precludes such interpretation. So, a gift to A., after the death of B., of property which A. would take immediately upon the testator's intestacy, gives to B. by implication a life interest, unless otherwise disposed of by the will. This rule applies to both realty and personalty,⁵ but is not likely to be extended beyond its present limits. Such abnormal limitations are probably owing wholly to some mistake on the part of the testator with respect to the inherent claims of the implied devisee. If, indeed, this tenant for life be a relation or widow⁶ of the testator, it is plain that he or she should be deemed to take a life estate by implication. But, in other cases, the limitations in question are, it is proba-

¹ Co. Litt. 206, *n*.

² Doe *d.* Ellis *v.* Ellis, 9 East, 382.

³ Eastman *v.* Baker, 1 Taunt. 174.

⁴ Harris *v.* Davis, 1 Coll. 423; *vide supra*, c. 7, 14.

⁵ Stevens *v.* Hale, 2 De. & Sm. 22.

⁶ See 1 Keen, 176.

ble, mere mistakes arising from some misconception of facts by the testator.

² The word "heirs," in connection with personalty, is often construed to mean children. In America it will generally mean all who take under the statute of distributions, and will include the widow.¹ In Maine it means almost any person except the common law heir.

Even though the subject-matter of the devise is governed by a peculiar local law of descent, yet a devise to the heir still enures to the common law heir.² If the subject-matter is personalty, and the gift is substitutionary, as, "to A., and, if he die before me, to his heirs," his next of kin will take.³ Probably this rule applies to all dispositions of personalty, whether they are substitutionary or not. It does not, however, comprise mixed gifts of realty and personalty. The heir will be preferred in such cases, at least in England,⁴ though probably not in America.⁵

Where the fund is mixed, the word "heirs" will be interpreted literally.⁶ It was held by Giffard, V. C., however, in *Herrick v. Franklin*,⁷ "that the term would be interpreted differently when applied to personalty, according to the precedent set in *Forth v. Chapman*."⁸ There is not, indeed, any very essential difference between rules of limitation and the meaning of a term denoting a class of beneficiaries. Still, to give one clause two different meanings, as was done in *Forth v. Chap-*

¹ See *Richardson v. Wheatland*, 7 M et. 173.

² 2 Jarm. 22.

³ *Vaux v. Henderson*, 1 Jac. & Walk. 388, n.

⁴ *Evans v. Salt*, 6 Beav. Ch. 266.

⁵ See 4 Kent, (5th ed.) 537, n; *Croom v. Keering*, 4 Hawks, 393; *Ricks v. Williams*, 1 Badg. & Den. 391.

⁶ *De Beauvoir v. De Beauvoir*, 15 Sim. 163; s. c. 3 Ho. of Lds. Cas. 524, 557.

⁷ Law Rep. 6 Eq. 593.

⁸ 1 P. Wms. 164.

man, is perhaps bold where no rule of tenure is directly in question.¹

Heirs at law in a bequest mean next of kin.² But, if real and personal estate are both so limited after a life estate, the heir will take all, unless the will discloses an intention that, *reddendo*, &c., both heirs and next of kin should take their respective and appropriate interests, and not that the whole should be enjoyed together.³

The courts, even in England, do not construe limitations of personalty as technically as those of realty. In America, as the devolution of realty is nearly the same as that of personalty, many stumbling-blocks of discontent are thus removed. The heir, too, is more freely allowed to take as purchaser here than in England,⁴ though this construction is not so readily allowed where the limitation is of a future estate.⁵

An heir may, in some of the United States, take a legacy under a will and also after acquired lands, contrary to the dispositions of the will.⁶ Such is the statute law of Maryland.⁷ The law on this point has been altered in Pennsylvania.⁸

By the Revised Statutes of New Jersey, 1847,⁹ on a devise to one for life, and at his death to his heirs, or issue, or heirs of the body, the lands after the death of the tenant for life go to his children as tenants in common in fee. In the same State a bare trust estate descends to the eldest son by primogeniture, as those estates are not within the State statute of descents.¹⁰

¹ See 1 P. Wms. 164.

² *Ricks v. Williams*, 1 Dev. Eq. 1.

³ *Gwynne v. Muddock*, 14 Ves. 488; *Gillian v. Underwood*, 3 Jones Eq. (N. C.) 100; *Patterson v. McMasters*, *Id.* 208.

⁴ 2 Redf. on Wills, 66.

⁵ *Campbell v. Rawdon*, 18 N. Y. 412.

⁶ *City of Philadelphia v. Davis*, 1 Wharton, 490; *contra*, *Thelasson v. Woodford*, 13 Ves. 209.

⁷ 4 Kent Com. 510; Laws of Md. 1850, c. 259.

⁸ Act of 8th April, 1833.

⁹ P. 740.

¹⁰ *Wills v. Cooper*, 1 Dutch. N. J. 137.

§ 3. *Executors.*

Under an immediate gift to A. or his heirs, the heirs will take by substitution, if A. dies in testator's lifetime. But, if the gift be to one for life remainder to A. or his executors, A. takes the whole interest, and on his death in testator's lifetime the gift will lapse.¹

It is thought that though a gift to A. or his representatives after a life estate means a gift to A. and his executors, yet, that an immediate gift to A. and his representatives must mean one to A. and his next of kin; else, if the legatee dies during testator's life-time, the gift lapses, and A.'s representatives take nothing. The distinction seems not to be well founded, though supported by the cases of *Bridge v. Abbot*² and *Cotton v. Cotton*.³ Or, rather, the rule acted on in these cases should govern alike both immediate and deferred gifts.⁴

The term "executors" or "representatives" means next of kin, when the words "share and share alike" &c., are added. The term is then equivalent to "heirs" taking by substitution, and includes a widow,⁵ but not a husband.⁶ These distinctions, however, would hardly be observed in the American States. Yet, it is important to know the English rules on such questions, as the English authorities, though not necessarily conclusive, would doubtless have weight with our tribunals.

Under a gift to A. and his executors, or to A. and his administrators, or to A. and to his legal representatives, A. takes the whole interest. The phrase "legal

¹ *In re Porter's Trust*, 4 K. & J. 188; *Bone v. Cook*, McLel. 168.

² 3 Bro. C. C. 224.

³ 2 Beav. 67; see *in re Crawford*, 2 Drew, 230.

⁴ See *King v. Cleveland*, 26 Beav. 26; *Gray v. Garman*, 2 Hare, 268.

⁵ *Smith v. Palmer*, 7 Hare, 235.

⁶ *King v. Cleveland*, 4 De G. and J. 447.

representatives," or "personal representatives," however, has frequently been held to mean next of kin,¹ just as the word heirs sometimes means children or more distant relatives. The primary meaning of "representative," indeed is administrator.

Even a gift to executors or administrators has been sometimes construed as a gift to next of kin.² Yet, the ruling, in *Palin's* case seems hardly sound. The limitation was obviously analogous to one for life, remainder to his heirs. This remainder vests in the ancestor. Why should not a similar limitation to executors be construed in the same manner?

The word "next" prefixed to "legal representatives" shows that the executors or administrators were not intended.³

A bequest of personalty to the representatives of A. means his executors. The property passes to them, and not directly to the next of kin.⁴ In all cases where the word "executors" or "administrators" is not a term of limitation, but of purchase, they will still hold the interest, not for their own benefit, but officially as part of the personal estate of the testator, unless the context is to the contrary.⁵ The case of *Wallis v. Taylor*,⁶ though acquiesced in by *Jarman*, seems to be an infirm leaning to the contrary. In that case the executors were held entitled for their own benefit. The interest, therefore, given to them, neither vested in the tenant for life nor went to the next of kin. Executors, no doubt, may take beneficially. But the context in *Wallis*

¹ *Bridge v. Abbot*, 3 B. C. C. 224; see *Long v. Blackall*, 2 Ves. 486.

² *Palin v. Hills*, 1 Myl. & Keen, 470.

³ *Booth v. Vicars*, 1 Coll. C. C. 6.

⁴ *Hinchclyfe v. Westwood*, 2 De G. & Sm. 216.

⁵ See *Stocks v. Dodsley*, 1 Keen, 325; *Long v. Blackhall*, 3 Ves. 483; Stat. 1 Wm. 4 c. 40.

⁶ 8 Sim. 241.

v. Taylor does not appear to have been sufficiently clear for this purpose.

A legacy to an executor means an acting executor.¹

The term "assigns" following "executors and administrators" is always a word of limitation.²

§ 4. *Son, issue.*

The word son is frequently a word of limitation; as, for instance, under a devise "to A., and if he dies not having a son," then over, here A. takes an estate tail. The word child, in the singular number, often has the same meaning. But, the primary meaning of the term son or child, or indeed of any word except "heir," in a deed, and except "heir and issue," in a will, is one of purchase, if the word may, in a secondary sense, be construed a term of limitation.³

"Descendants," as a rule, will not include collateral relations.⁴ The term "descendants" means issue of every degree and all take *per capita*, and concurrently with their parent.⁵ Conversely, "issue is synonymous with descendants."⁶ These were cases of bequests. But the word issue means the same persons, in a devise of realty.⁷ If, however, the ancestor gets an estate for life, the word issue will then be equivalent to heirs of the body, and the ancestor will take an estate tail. As the issue take concurrently estates in New York by the Revised Statutes, and in those other States having the

¹ Rothmaler v. Myers, 4 Desaus, 215.

² Graffey v. Humpage, 1 Beav. 46; see also Hames v. Hames, 2 Keen, 646.

³ See 2 Moo. & Pay. 512.

⁴ Hamlin v. Osgood, 1 Redf. Sur. Rep. 409; Baker v. Baker, 8 Gray, 101.

⁵ Butler v. Stratton, 3 B. C. C. 367.

⁶ Haydon v. Willshire, 3 Durn. & E. 372, Davenport v. Hanbury, 2 Ves. 257; Kingsland v. Rapelye, 2 Edw. 1.

⁷ Cooke v. Cooke, 2 Vern. 545; Mogg v. Mogg, 1 Mer. 654.

same law, there is the more reason now for adopting the construction mentioned.¹

The words "issue," "son," "child," will be less readily held to be words of limitation in bequests than in devises of freehold. Sometimes these terms will be construed words of purchase as to the absolute interest, subject to a life interest in their ancestor, or as conferring a substitutional gift, in case of a lapse of the gift to him.²

In the American States, "issue" is held to be a term of limitation.³ It is, in the main, equivalent to heirs of the body. The distinctions are,⁴ first: The rule in *Wild's case* does not apply to a devise to one, and his issue. Secondly, words of distribution, as "share and share alike," superadded to the word "issue," will prevent the ancestor from taking an estate tail, although such distributive expressions would have been inoperative if, instead of "issue," the phrase in question were "heirs of the body." Under a devise to A. and his issue, some old cases give A. only a life estate, with remainder to his first and other sons in tail. But, at the present day A. would doubtless take an estate tail, since, even if the devise be to A. for life, and after his death to his issue, A. takes such an estate.⁵

A devise to A. and his issue living, at his death has been held to be an estate tail in A.⁶ But, this ruling is probably now obsolete. Under such a devise, A. would at the present day most probably take, in the American States, an estate for life, with remainder to his eldest son surviving him, whilst the personalty would be

¹ See 2 Jarm. 35.

² 2 Jarm. 498.

³ *Kingsland v. Rapelye*, 3 Edw. 1.

⁴ *Ferrill v. Talbot*, Ril. Ch. Co. 247; *Kingsland v. Rapelye*, 3 Edw. 1.

⁵ *King v. Melling*, 1 Vent. 225.

⁶ *University of Oxford v. Clifton*, 1 Ed. 473.

divided amongst all the issue. At least, by giving the personalty to the eldest son, its ulterior devolution amongst the issue of A. would not be secured in the way in which the realty would. Where the rules of law differ in respect to the devolution of realty and personalty, why should not the rule in *Forth v. Chapman*¹ be acted on, when necessary, and the same words be construed differently in respect to both descriptions of property.²

Jarman³ considers that under a devise to A. and his issue, and if he die without issue living at his death, remainder over, A. takes an estate tail. The case of *Lyon v. Michell*⁴ decided that a similar limitation of personalty was valid, although a quasi entail of personalty standing alone would give the absolute interest, and no remainder could be limited thereon.

The rule in *Shelley's Case* is not precluded by the addition of words of limitation descriptive of the same kind of heirs as referred to in a previous limitation to issue, as a devise to A. for life, and after his decease to his issue male, and the heirs male of the body of such issue.⁵ Jarman thinks that even if the ulterior limitation is to the heirs general of the issue, the ancestor still takes an estate tail.⁶ Authority is not in favor of this view. For, the case of *Loddington v. Kime*⁷ is distinguishable from those by which Jarman thinks it has been overruled. *Loddington v. Kime* appears to be still law.⁸

The cases cited by Jarman as overruling *Loddington v. Kime* all contained the clause in default of such

¹ 1 P. W. 663.

² See 2 Jarm. 330, note.

³ Vol. II, 359.

⁴ 1 Madd. 467.

⁵ *Roe d. Dodson v. Green*, 2 Wils. 322.

⁶ *King v. Burchell*, 1 Ed. 424.

⁷ 1 Salk. 224.

⁸ See *Doe d. Cooper v. Collis*, 4 Durn. & E. 294; and *Frank v. Stovin*, 3 East, 553.

issue. With respect to this clause, Jarman says,¹ "To say that the words 'in default of such issue' refer to the prior devisees, whoever they may be, and that those objects mean issue indefinitely, by the effect of the words in question, seems very much like reasoning in a circle." But is not a similar process of interpretation adopted by every reference to the context, and conversely? A will is like a sorites or series of distinct propositions, all illustrating the general purpose of the testator, and mutually reflecting light on each other.

In the American States, the word "children" is, primarily, a term of purchase,² and not of limitation. It includes only immediate issue lawfully begotten, and not illegitimate children, unless the gift will otherwise be inoperative, or the context indicate an intention to include them.³

In the American States, a legacy to children will not include grandchildren,⁴ but will extend to all after-born children, unless the testator very explicitly declares to the contrary. A like rule prevails as to all the children of others who are born previous to the period of distribution. If the legacy be in remainder, of course it is not necessary for a legatee to survive the period of distribution.⁵

As the term "children" does not include grandchildren, so "nephew" does not include great-nephew, or a nephew by affinity,⁶ though the latter point has been recently otherwise decided in England,⁷ contrary to the preceding cases.

Grandchildren will take under a gift to children, if

¹ Vol. II, 344.

² *Chrystie v. Phyfe*, 19 N. Y. 344.

³ *Cromer v. Pinckney*, 3 Barb. Ch. 466.

⁴ *Hallowell v. Phipps*, 2 Whart. 376.

⁵ *In re Orton's Trust*, Law Rep. 3 Eq. 375.

⁶ *Smith v. Lidiard*, 3 K. & J. 252.

⁷ *Grant v. Grant*, 39 Law J. N. S. 140, 272.

there are none such.¹ Jarman² is opposed to this view if the parent is living; for then there is a possibility of his having children. Jarman's view seems to be sound. Else the testament will be interpreted by events.

Children may, by the context, include deceased children,³ grandchildren or step-children,⁴ and the phrase, "all the children of my brothers," though used as if to designate a class, may be held to denote nephews and nieces enumerated elsewhere in the will.⁵ "Grandchildren" do not comprise "great-grandchildren," although there may be a clause in the will expressly including grandchildren under the term children,⁶ unless the context is explicit on the point. "Nephews and nieces" may be shown by circumstances to include grand-nephews and grand-nieces, or even a great-grand-niece.⁷

As, in the United States, posthumous children are, for all testamentary purposes, the same as other children,⁸ therefore under a limitation to children "born" at a particular period, a child then *ventre sa mere* will take.⁹

A power to appoint to children will not authorize an appointment to grandchildren, even when there are no children.¹⁰

Adopted children are not the children of the adopter's wife.¹¹

¹ Drayton v. Drayton, 1 Desaus, 327; see Smith's case, 2 Desaus, 308.

² Vol. II, 52.

³ Lawrence v. Hebbard, 1 Bradf. 252.

⁴ Barnes v. Greenzeback, 1 Edw. 41; see Lawrence v. Hebbard, 1 Bradf. 252.

⁵ Lorillard v. Coster, 5 Paige, 172, 184.

⁶ Hone v. Van Schaick, 3 N. Y. (3 Comst.) 538.

⁷ Cromer v. Pinckney, 3 Barb. Ch. 466; Bowers v. Brower, 9 N. Y. Leg. Obs. 196.

⁸ Rev. Stat. N. Y. Vol. I, 724; 4th Kent, (5th ed.) 280, 412 Stat. of Dist.

⁹ Trower v. Butts, 1 S. & Stu. 181.

¹⁰ Robinson v. Hardcastle, 2 Bro. C. C. 344.

¹¹ Barnes v. Allen, 25 Ind. 222.

A bequest to the two oldest children of A., means the two oldest at the death of the testator. The reference points to age, not names;¹ and where there is a devise to children as a class, those by different marriages will take, especially if there is a gift over on default of issue.²

Representation is not allowed, in Connecticut, beyond the degree of brothers' and sisters' children.³ In North Carolina, a devise to a class operates at the testator's death. But, where there is a preceding life estate, all born into the class during the life estate, participate; and those who die during the same period do not lose their interests.⁴

A mistake in the number of "children" referred to in a will, is generally unimportant. If, therefore, the testator refers to A.'s three children, whereas he has four or five, all will, nevertheless, take. If the number specified be that of the children living at the date of the will, none born afterwards can take.⁵

In *Langston v. Langston*,⁶ the House of Lords raised an estate tail by implication in an eldest son, though he was not mentioned at all in the will, while the second, third, fourth, and *other* sons were. "Other" was held to comprise the eldest son. This is, perhaps, the most strange decision on record. Had the House held the omission of the word "first" to have been caused by mistake, their judgment would have been rational, though not legal. But to imply an estate from an *et cetera*, while there was a palpable omission

¹ *Miles v. Boyden*, 3 Pick. 213.

² *Crotchett v. Taynton*, 1 Russ. & My. 541; see *Stavers v. Barnard*, 2 Y. & C. C. 539.

³ See *Cooke v. Catlin*, 25 Conn. 387.

⁴ *Mason v. White*, 8 Jones. Law, 421; *Simson v. Smith*, 6 Eq. 347.

⁵ *Adams v. Logan*, 6 Mon. 175; *Vernon v. Henry*, 6 Watts, 192.

⁶ 8 Bligh, N. S. 16.

of the name of the eldest son from the place where it ought to be, seems as strange as it is entirely opposed to many of the rules of the courts in construing devises strictly. Giving an interest to persons unnamed is, however, no compensation, on the average, to those who are named by testators, but despoiled by the law.

"Younger children" are to be ascertained only when the portions are payable, if the gift proceeds from a parent. If a stranger is the testator, they are to be ascertained at his death.¹ One who is then a younger child is not excluded by becoming elder afterwards.²

Younger children mean those who do not take the family estate, whether they are younger or not. Thus, the eldest son, if unprovided for, may take under the description of a younger child. Yet, this rule does not apply if the testator is not a parent, but a stranger. A "youngest child," also, sufficiently indicates an only child.

In *Parkman v. Bowdoin*,³ the word children was construed to mean issue or heirs of the body. However, there is a great indisposition in American courts to extend the application of the rule in Shelley's case under wills, or even to adopt that rule to the extent allowed in England.

The word issue frequently means children, especially where "issue" are substituted for their parents,⁴ and they are directed to take their "parents'," or their "father's" or "mother's" shares.⁵

In a devise with power in trust to convey "to any

¹ *Miles v. Boyden*, 3 Pick. 213.

² 2 Jarm. 119.

³ 1st Circ. (Mass.) 1833; 1 Sumn. 359.

⁴ *Merrymans v. Merrymans*, 5 Munf. 440.

⁵ *Buckle v. Fawcett*, 4 Hare, 536.

of the male descendants of any family of the name of D. and their heirs," the word family was held to mean children who took individually *per capita*.¹ The phrase "legal representatives" also sometimes means children.²

The rule in Wild's case is, that a devise to one and his children gives the parent an estate tail, if he has no children at the time of the devise,³ but, if he has children then, he takes jointly with them. In a devise to A. to hold "to him, his children, or grandchildren" A. was held to take an estate tail, as he had no grandchildren at the date of the will, though he had children.⁴ This ruling is sound, since the phrase "or grandchildren" showed that the word children was not a term of purchase or designation of individuals. The case is precisely similar to Wood *v.* Baron.⁵ The rule in Wild's case is not applied in favor of after-born children, if those living at the time of the will shall die.

§ 5. *Illegitimate children.*

It is sometimes hard to determine whether a description of a person is partly erroneous, or points to an illegitimate relative.⁶ The maxim which presumes all past events to be legal—*omnia præsumuntur*—is often applied to help the interpretation of such a passage. The word children, for instance, standing alone, means only legitimate children.⁷ A like rule

¹ Dominick *v.* Sayre, 3 Sandf. 555.

² Phyfe *v.* Phyfe, 3 Bradf. 45.

³ Nightingale *v.* Burrell, 15 Pick. 104-114; see Carr *v.* Estill, 16 B. Monroe (Ky.) 309.

⁴ Wheatland *v.* Dodge, 10 Met. 502.

⁵ 1 East, 259.

⁶ James *v.* Smith, 14 Sim. 214.

⁷ Wilkinson *v.* Adams, 1 V. & B. 422.

applies to the terms "son," "issue," "relations," &c.¹ The last term is also construed to mean next of kin, within the meaning of the statute of distributions. If held to mean all relations of the donee, the gift would be void for uncertainty and indefiniteness.

The presumption implied in the maxim quoted excludes illegitimate children, if there are or ever can be any legitimate who can take the gift.² "The question comes round to this," says Lord Eldon, "whether it is possible to say he could mean at the time of making that will any but illegitimate children."³

Illegitimate children, however, will take the gift, if their parent is dead at the date of the will, and this fact is known to the testator.⁴

Illegitimate children or other similar relatives never take under a gift to children or other relatives, if the testator could possibly mean any but illegitimate.⁵ An impossibility of this kind, indeed, occurs, if the parent is believed by the testator to have died and have left none but illegitimate children, or, at most, but one legitimate child. The illegitimate children take in such a case. They will also take by name as persons designated. But, whenever they can be excluded without doing violence to the context, the courts will do so.

In *Edmunds v. Fessey*⁶ the testator gave a legacy to "the sons and daughters of A. B. living at my death." There were two legitimate and one illegitimate son and one illegitimate daughter of A. B. living at the time of the testator's death. Sir John Romilly, M. R., admitted the illegitimate daughter, but excluded the illegitimate

¹ *Id.* 468.

² *Kenchel v. Scafton*, 2 East, 530.

³ *Wilkinson v. Adam*, *ut. sup.*

⁴ *Lord Woodhouselee v. Dalrymple*, 2 Mer. 419; *Gill v. Shelley*, 2 R. & My. 336.

⁵ *Wilkinson v. Adam*, 1 V. & B. 461, 468.

⁶ 7 Jur. N. S. 282.

son. His Honor had no alternative according to the settled rules respecting the admissibility of illegitimate children. The decision may appear to have turned on the accident of the event. But, this cannot affect the principles of interpretation. The testator might have contemplated the possibility of the very event which happened.

An illegitimate child, indeed, cannot take under a general description, as "such other child that may be born of my house-keeper."¹ The case of *Edmunds v. Fassey*, however, would be decided differently in America, where all the illegitimate children would probably, under the circumstances, be admitted to take.

Under a gift to children, an illegitimate child can only take when recognized as a child, and when there are no other children. But, if there is one legitimate child, the illegitimate child will still take under a gift to children in the plural.

In *Bayley v. Mollard*,² the testator give a legacy to the illegitimate child of W.; yet, such a child got no share in a residue given to the children of W. This case ignored the sense in which the testator obviously used the term "children" in his will. On the other hand, in *Wilkinson v. Adam*,³ the future illegitimate children of a testator were let in, although this devise savors of immorality, and though legitimate children might possibly claim under the bequest in question.

Legitimate and illegitimate children never can both claim under the same bequest, and if there is at the date of the will a possibility that both may claim, the illegitimate can never take. If they do, then the legitimate cannot take, unless all are persons designated.

¹ *Medworth v. Pope*, 5 Jur. N. S. 996; see *Edmunds v. Fassey*, 7 Jur. N. S. 282.

² 1 Russ. & Myl. 581.

³ 1 Ves. & Bea. 422.

In *Shearman v. Angel*,¹ a testator gave a bequest to his mother for life, remainder to her children, and gave another bequest to his sister. The testator and his sister were illegitimate children of the "mother." The sister was considered not to be included in the devise to the "children." This decision was harsh, when we consider that the testator was himself illegitimate, and did not expressly exclude his "sister" from the second bequest.

A testator devised real estate to his two daughters, A. and M., "meaning and intending that all the children that have been or may be born of their bodies shall become heirs to the same." At the time the will was made, both daughters had illegitimate children. It was held that the daughters took in fee, and that the illegitimate children were only to be regarded as their heirs equally with legitimate ones.²

A bequest to an unborn illegitimate child, the mother being described, is valid,³ unless the paternity of the child is made a qualification of its taking the bequest. It is then void, the bastard being necessarily by law nobody's child—*filius nullius*.

§ 6. *Family*.

The term "family" primarily means children, as regards bequests. Therefore, a bequest to A.'s family does not comprise A. or his wife.⁴

In devises of realty, "family" means heirs, or heirs of the body. Of course, the context may show that the testator meant by family a whole household, including servants, or his next of kin.

The word "family," however, will often be construed

¹ 1 Bail. Eq. 351.

² *Hughes v. Knowlton*, 37 Conn. 429; *Woodstock v. Hooker*, 6 Conn. 55; *Welles v. Allcott*, Kirby, 118.

³ *Pratt v. Flamen*, 5 Har. & Johns. 10.

⁴ *Barnes v. Patch*, 8 Ves. 604.

to mean relatives, rather than children,¹ just as where a testator uses the words issue and children synonymously, the meaning of the term issue will prevail.² The general meaning of a term obtains, of course, in wills only where the terms in question are not interpreted by the context.³

The word family may of course, therefore, be so qualified by the context as to mean heirs, or even relatives by marriage.⁴

If the interest was mere personalty, the term, if standing alone, was formerly void for uncertainty.⁵

If the interest was composed of both realty and personalty, the same result sometimes followed.⁶

All these decisions, indeed, may be considered as overruled at the present day.

If the interest was realty, the term family was rarely or never void for uncertainty, but was rather construed to mean heir.⁷

The term "house" has always had the same signification,⁸ when used with a personal, not real, reference. A like rule was applied to mixed realty and leaseholds.⁹ However, it is certain that at the present day, even in England, the term family would never be held void for uncertainty, even as to bequests of pure personalty.

¹ *Crump v. Colman*, 9 Ves. 319.

² *Wyth v. Blackman*, 1 Ves. Sen. 196; *Merrymans v. Merrymans*, 5 Munf. 440.

³ See *Cuishan v. Newland*, 2 Scott, 105, and *Jennings v. Newman*, 10 Sim. 219.

⁴ 2 Jarm. 19; 2 Williams on Ex. 2d. Am. ed. 818, 819; see 2 Story Eq. Jur. § 1065 b, § 1071.

⁵ *Harland v. Trigg*, 1 B. C. C. 142; *Robinson v. Waddelow*, 8 Sim. 134.

⁶ *Doe d. Hayter v. Joinville*, 3 East, 172.

⁷ *Connden v. Clerke*, Hobart's Rep. 29; *Wright v. Atkyns*, 17 Ves. 255; see 2 Story Eq. Jur. § 1071.

⁸ *Chapman's case*, Dyer, 333 b. ⁹ *Wright v. Atkyns*, 17 Ves. 255.

The word family,¹ or relations², used in a devise of both realty and personalty will receive the same construction as to both kinds of property,³ unless the context declares or implies to the contrary.

§ 7. *Next of kin.*

The phrase "next of kin" means the nearest in blood, including the father and mother of the propositus, but excludes a husband, wife, and those who claim by representation.⁴ For instance, a brother, but not the children of a deceased brother, would claim under a gift to next of kin.⁵ This decision has not been yet overruled—a contingency now not to be thought of. Legislative interposition alone ought ever to be invoked for the purpose of altering a rule fortified by numerous cases.

The phrase "next of kin," therefore, means "the nearest blood relations," as father, mother and children of the propositus, and excludes those entitled by representation. These would be admitted under the statute of distributions, while the children would exclude the parents. Next of kin also take as joint tenants, while next of kin under the statute take as tenants in common.⁶ But a reference to next of kin, *as if I had died intestate*, means the next of kin according to the statutes. "Next of kin" does not comprise relations by affinity.⁷

The rule in *Spink v. Lewis*,⁸ which does not defer the period of ascertaining next of kin until the interest falls into possession, though the testator gives it to next of

¹ 17 Ves. 255.

² 19 Ves. 299

³ *Ridgway v. Munkittrick*, 1 Dru. & War. 84; see *Carter v. Bental*, 2 Beav. 551.

⁴ *Wright v. Trustees of Method. Epis. Church*, 1 Hoff. Ch. 213.

⁵ *Elmesley v. Young*, 2 Myl. & Keen, 780.

⁶ *Elmesley v. Young*, 2 My. & K. 780.

⁷ *Nichols v. Savage*, 18 Ves. 52.

⁸ 3 Br. C. C. 355.

kin "living at the time the estate comes into possession," is justly disapproved by Judge Redfield.¹

The rule in *Gundry v. Pinniger*, which recognizes only the next of kin at the time of the testator's death, is thought by Mr. Hawkins² not to apply so strictly to relations. The cases support this view.³

"Next of kin of the male line" means merely next of kin *ex parte paterna*.⁴

A gift to next of kin *ex parte materna* may go to one who is also next of kin *ex parte paterna*, unless the male side is excluded.⁵ If it is, then the next of kin after the former take. The phrase "next of kin by way of heirship" means, as regards realty, the heir, even though he be not next of kin.⁶

§ 8. *Relations.*

Relatives mean next of kin, according to the statute of distributions.⁷ This rule applies to gifts of realty as well as of personalty, yet the term does not include a wife. In *Storer v. Wheatly*,⁸ a bequest to "nearest relations or connections according to the laws of the commonwealth" was held, in Pennsylvania, not to include testator's widow. The term "relations" never includes husband or wife or relations by affinity. The case of *Withy v. Mangles*⁹ is an authority for the position that "next of kin" will be computed by the degree of their relationships, even though some of them might not take

¹ Vol. II, 90.

² P. 105.

³ See *Lees v. Massey*, 3 De G. F. & J. 113; *Tiffin v. Longman*, 15 B. 275.

⁴ *Boys v. Bradley*, 10 Hare, 389.

⁵ *Gundry v. Pinniger*, 14 Beav. 94.

⁶ *Williams v. Ashton*, 1 Johns. & H. 115.

⁷ *Morton v. Barrett*, 22 Me. 257.

⁸ 1 Penn. Stat. 506.

⁹ 4 Jurist, 717.

under the statute of distributions. In the case cited, the parents as well as the children of the testator participated in a gift to next of kin.

The word "near," "deserving" or "poor," prefixed to "relations," does not alter the sense of the latter term. But the phrase "nearest relations" means next of kin simply, and without representation. "To my next of kin as if I had died intestate" is only the same as "to my next of kin," and does not include the testator's widow.¹

A gift to poor relations is sometimes construed as a charitable use, though confined to next of kin. If such a gift, therefore, consists of réalty, it will be void by statute in England and in some of the States.²

A gift to relations of one's *name* means a gift to persons of his *stock* or family. Therefore, a married sister will take, unless the testator really meant that his name should be borne by the donee at the time of the vesting of the interest. In the latter case, the assumption of the name by legal license is of no avail.³

If the testator specifies a certain number of his "nearest" relatives, the description will be applied irrespectively of the statute.⁴ The case cited also determines that, where the gift is to "relatives or connections," connections by affinity will not take until the list of blood relations is exhausted. Under a gift to "such of my nearest relations as my executors shall think the greatest objects of charity," only those entitled under the statute of distributions will take in New Hampshire.⁵

"Relations" mean those existing at the time of testator's death. A like rule applies where a life inter-

¹ Smith v. Campbell, 10 Ves. 400.

² Leigh v. Leigh, 5 Ves. 92.

³ Varrell v. Wendell, 20 N. H. 431.

⁴ See *infra*, c. 26, § 5.

⁵ Ennis v. Pentz, 3 Bradf. 382.

est is given to a stranger, remainder to the testator's next of kin. The gift vests in interest at the testator's death, though not in possession until the death of the life tenant.¹ "Next of kin" of another, who is dead or dies before the testator, are reckoned at the testator's death, but, if the testator dies before him, then at his death, no matter whether the gift vests then in possession or not. If the gift be to the next of kin of B. living at a certain time, still none can take but those who were next of kin at the time of the testator's death, and who survive the stated period.

If there be a gift to A. for life, remainder to A.'s next of kin, and A. is the testator's sole next of kin, then it is alleged that these are reckoned at A.'s death, and not at the testator's, contrary to the general rule.² But, it is doubtful whether this exception to the general rule of vesting at the testator's death applies at all to realty, as the law is greatly opposed to suspensions of interests in realty. Lord Hardwicke, in *Pyot v. Pyot*,³ thought that in cases of executory devise the period of vesting was the period of distribution, but Jarman doubts the force of this case. Mr. Hawkins⁴ considers that the period of vesting is not affected by the fact that the tenant for life is the testator's sole next of kin, and cites *Halloway v. Halloway*,⁵ *Ware v. Rowland*,⁶ and other cases in support of his view. The later cases have settled this point as Mr. Hawkins alleges.

A charitable gift to relations, however, is not confined to those within the statute.⁷ Therefore, also, a power of selection of relations may be exercised in favor of those outside the bounds of the statute.⁸ But a power of distribution is confined within those limits.

¹ 2 Jarm. 52.² 2 Jarm. 60.³ 1 Ves. Sen. 335.⁴ P. 100.⁵ 5 Ves. 399.⁶ 2 Phill. 635.⁷ Attorney-General v. Price, 17 Ves. 371.⁸ Pope v. Whitcombe, 3 Mer. 689.

The donee of any power to appoint amongst next of kin may appoint amongst those who are such at the period of distribution.¹

By the phrase "relatives or connections" substitution may be intended; but connections by affinity will not take until the class of relatives by blood is first exhausted.²

The court will never give a term a secondary meaning if such will render the gift void,³ but will readily deviate from the primary sense in order to effectuate the intention. Thus, "children" may comprise grandchildren,⁴ and more remote descendants. "Cousins," however, means merely first cousins. The phrase "brothers and sisters" comprises those of the half blood, but relations by affinity are, as a rule, not regarded as comprised under general terms.

A devise to one's wife means only the person who is the testator's wife at the date of the will.⁵ A devise to "the husbands of my daughters" will probably be construed in the same way.⁶

A gift to "my servants," it is thought,⁷ will extend to those in testator's service at date of the will, though they leave it before his death. Judge Redfield⁸ prefers to comprise by such a phrase only those who are in the testator's service at the time of his decease, no matter whether they were his servants at the time of his making the will or not. The best rule, perhaps, would be not to admit those who entered testator's service recent-

¹ *Finch v. Hollingsworth*, 21 B. 112.

² *Ennis v. Pentz*, 3 Bradf. 382.

³ *Crooke v. Brooking*, 2 Vern. 107.

⁴ *Prowett v. Rodman*, 37 N. Y. 42; see *Jackson v. Staats*, 11 Johns. 337, 351; *Hallowell v. Phipps*, 2 Whart. 376.

⁵ 2 Redf. 28, n; *Lady Lincoln v. Pelham*, 10 Ves. 166.

⁶ *Bryant's Trusts*, 2 Sim. N. S. 103.

⁷ 1 Jarm. 306.

⁸ Vol. II, 96.

ly before his death, nor those who were then serving elsewhere, but to confine the bequest to such of testator's servants as were in his service both at the date of the will and at the time of his death. The term "servants" means *domestics* hired at a *yearly* stipend. Of course, if a word occurs frequently in a will, the term will be throughout interpreted in the same manner, if there is nothing in the context to the contrary.¹ *Aliter* if the context is adverse to such an interpretation.²

§ 9. *Stocks and individuals.*

"Issue" take as joint tenants. If the gift is to them as tenants in common, they take *per capita*.³ A gift to the children of several persons, as of A. and B., is distributed amongst them *per capita*, and not *per stirpes*.⁴ A like rule applies to a gift to one, and the children of another standing in the same relation to the testator, as "to my brother A. and the children of my brother B." This rule, however, will not apply if the income is applicable *per stirpes*. Other slight indications of intention will neutralize the legal presumption. The rule is somewhat irrational. It is doubtful whether it is recognized in America.⁵

Though, under a gift to the children of A. and B., as tenants in common, the children take *per capita*,⁶ yet they will take *per stirpes*, if A. and B. take life estates.⁷ The doctrine in *Arrow v. Mellish* seems sound, yet it is so limited, if not infringed upon, by other cases,⁸ that no

¹ *Ridgway v. Munketrick*, 1 Dru. & War. 84.

² *Carter v. Bentall*, 2 Beav. 551.

³ *Davenport v. Hanbury*, 3 Ves. 258.

⁴ *Ex parte Leith*, 1 Hill Ch. 153.

⁵ See *Alder v. Beall*, 11 Gill & J. 123; *Tissel's Appeal*, 27 Penn. St. 55.

⁶ *Lincoln v. Pelham*, 10 Ves. 166.

⁷ *Arrow v. Mellish*, 1 De G. & Sm. 355.

⁸ See *Abrey v. Newman*, 16 B. 431.

great reliance can be placed on it, except where the context is the same as in the instrument there adjudicated upon.

As the phrase, "to be divided equally among the children of A., B., and C." gives *per capita*,¹ so a like rule applies where the gift is to persons standing in various degrees of relationship to the testator.²

Under a devise of a homestead to testator's three daughters, A., B., and C., and the children of his son, D., the devisees were held to take *per stirpes*.³ Under a devise of the testator's estate,⁴ "one-fourth part to be given to the families of G. H., W. B. B., and A. B., to those of their children that my wife shall think proper, but in a greater proportion to F. P. H., than to any other of G. H.'s children; to E. B. in a greater proportion than any other of A. B.'s children; and the balance to be given to the families of C. and J. T. G.'s children, in equal proportion," it was held that the children of C. and J. T. G. took *per stirpes* and not *per capita*, and that the property devised to them was to be divided into two equal parts, one moiety to be assigned to each family.

"I wish my personal and real estate to be appropriated equally to the benefit of my wife, E., and of my children,"⁵ naming two. It was held the legatees all took *per capita*, and that each was entitled to one-third of the residue, after the widow's dower was satisfied. A testator bequeathed the residue to his brother A., and to the male heirs of his deceased brother B., with the direction that C., one of the sons of B., should re-

¹ Collins v. Hoxie, 9 Paige, 81.

² Murphy v. Harvey, 4 Edw. 131; see Bunner v. Storm, 1 Sandf. Ch. 357.

³ Lyon v. Acker, 33 Conn. 222; see Leland v. Adams, 12 Allen, 286.

⁴ Walker v. Griffin, 11 Wheat. 375.

⁵ Seabury v. Brewer, 53 Barb. 662.

ceive "no part whatever, but the same to be divided among the other male heirs of said B., deceased."¹ It was held that the distribution should be *per stirpes* and not *per capita*.

Under a bequest to "the descendants of my three uncles," the children of the uncles take *per capita*, and not *per stirpes*;² and, under a bequest "to the heirs of my late husband, and to my heirs equally," each class of heirs takes, *per stirpes*, one-half of the sum bequeathed.³

Next of kin take *per stirpes*.⁴ As to distribution in Connecticut, see *Cook v. Catlin*.⁵ Relations, however, take *per capita*, if they happen to be all of the same degree, though descended, say two or more from one stock, and one only from another.

Toller in his work "on Executors," and Mr. Justice Williams in his comprehensive treatise "on Executors and Administrators," have laid down that, "If a father have three children, John, Mary, and Henry, and they all die before the father, John leaving, for instance, two children, Mary three, and Henry four, and afterward the father die intestate, in that case all his grandchildren shall have an equal share, for, as his children are all dead, their children shall take as next of kin. Such, also, would be the case with respect to the great grandchildren of the intestate, if both his children and grandchildren had all died before him." Sir John Wickens, however, *in re Ross's Trusts*,⁶ has held that the passage cited is not law, and is a mere dictum transferred into

¹ *Clark v. Lynch*, 46 Barb. 68.

² *Brown v. Brown*, 6 Bush, (Ky.) 648.

³ *Bassett v. Granger*, 100 Mass. 348.

⁴ *Tillinghast v. Cook*, 9 Met. 143, 147.

⁵ 25 Conn. 387.

⁶ Referred to in *Albany Law Journal*, Vol. V, 135.

Mr. Justice Williams' treatise from Toller, and that "it appears to stand there on the authority of Toller, since the only cases cited are those cited by Toller, and that these are irrelevant." In the case supposed by Toller, therefore, the issue take *per stirpes*, and not *per capita*.

CHAPTER XXIV.

§ 1. *Nature of legacies.*

A testamentary gift of land is termed a devise; of personalty, a legacy or bequest. The term legacy includes annuities and all *personal* charges,¹ unless the context is to the contrary. A bequest, however, of an annuity or clear yearly sum, is a gift free of legacy duty.² The phrase "all the legacies before mentioned" will not include a portion.³ "An equal share of my property" applies to the interest which the donee is to take, as well as to the subject of the gift.⁴ "Equally to be divided" relates to the quality and not to the quantity of interest given, and creates a tenancy in common.⁵ In *Eagle v. Emmet*,⁶ it was held that a policy of insurance does not pass under a general devise of personal estate, but that the representatives of the testator take such moneys as may accrue from the policy in trust for the parties interested in the property insured.

It was held in *Ennis v. Smith*,⁷ that a bequest of "all my effects" may be so controlled by the context and surrounding circumstances as to deprive the phrase of its full natural effect. Parol evidence, however, would not be admitted in England of the meaning of the

¹ See *Heath v. Weston*, 3 D. M. & G. 601.

² *Pridie v. Field*, 19 B. 497.

³ *Sholl v. Sholl*, 5 Barb. 312.

⁴ *Lawrence v. Lawrence*, 1 Edw. 241.

⁵ *Sweet v. Geisenhainer*, 3 Bradf. 314.

⁶ 4 Bradf. 117.

⁷ 14 H. 400; *Smith v. Bell*, 6 Pet. 768.

phrase, even in more peculiar circumstances than existed in the case of *Ennis v. Smith*. Indeed, there seems to be no ground, in point of principle, for holding that the phrase admits of any basis whatever for the adduction of parol evidence. Such evidence is admitted when the ambiguity relates to a concrete subject or object, and not to abstract phrases, such as effects, property, or wealth in general.

In deciding on the validity and construction of purely personal legacies, the court follows the analogies of the civil law, but, as regards legacies charged on land, these are interpreted according to the rules of the common law. For, formerly, personal legacies were administered by the ecclesiastical courts, which used the civil law. But, devises of land were construed by the common law courts since the reign of Henry the Eighth.

No suit lies at common law by a legatee against an executor, unless he has assented to the legacy, and it is specific; because until the testator's debts are paid, it is not clear that the legatee has any claim.¹ This is another advantage which a specific has over a general legatee, who, *semble*, can never sue at common law, even though the executor has assented to his bequest.² These rules of law are now altered in many of the States. But, where no statute applies, the rules of the common law, of course, still subsist, unless nullified by the course of adjudication. Where there is an actual trust, express, implied, or constructive, or the legacy is charged on land, equity will assert an exclusive jurisdiction, and in all other cases the court has a concurrent jurisdiction, except where statute law provides to the contrary.

A testator is presumed to speak of the state of his

¹ 2 Bl. Com. 512.

² Story, Eq. Jur. 591.

personalty as existing at the time of his death, unless there is something in the context on the nature of the subject matter, or of the provision, to preclude this presumption. Therefore, where a testator releases A. from all notes, charges, or advances, this means such securities as may be due by A. to the testator at his decease.¹ Bequests, indeed, are often construed as if the will spoke from its date. A codicil, however, makes the will always speak from the date of the codicil, unless a contrary intention is apparent.²

§ 2. *Legacies classified.*

Legacies are either general, demonstrative, or specific. A legacy is general when it is a sum of money or a gift of an article, such as a horse or ring, shares or stocks, without further description. General gifts of the latter kind, however, are rare. They are usually specific, such as "my shares, ring, horse," &c. A demonstrative legacy is a gift of a general legacy to be drawn from a specific fund. A specific legacy is a gift of a thing in specie, and not of its value, as "my brown mare," "my gold watch," "my leasehold" or "my freehold at Greenacre." Such a legacy is ear-marked, and is not drawn from a larger fund of a different kind, though, of course, it may form part of a larger specific fund of the same nature. Thus, a bequest of 1,000 bonds out of my five-twenty bonds or consols, is specific.³ But, a bequest of \$1,000 out of my five-twenty bonds, is demonstrative. Legacies may thus be specific, although no suit in equity might lie for a

¹ Van Vechten v. Van Vechten, 8 Paige, 104; Collin v. Collin, 1 Barb. Ch. 630.

² Van Alstyne v. Van Alstyne, 28 N. Y. 375; 1 Williams on Ex'ors, 175, 1 Hill, 590.

³ Mullins v. Smith, 1 Dr. & Sm. 204.

specific performance on a contract to transfer the property bequeathed. The term specific, therefore, as applied to a legacy, denotes a gift that is capable of identification or an ear-mark, and which is, in point of fact, actually identified by the testator for the purpose of transmission to the legatee. A demonstrative legacy is a general legacy payable, primarily, out of a specific fund.¹ It is a legacy of quantity, of the nature of a specific legacy, as of so much money, with reference to a particular fund for payment. The term demonstrative is derived from the civilians. If the legacy is a specific part of a larger specified fund, it is, of course, specific, and not demonstrative.²

The most beneficial kind of legacy for a donee is a demonstrative gift. Except that it does not carry interest from the date of the testator's death, it unites all the good incidents of specific with those of general legacies, inasmuch as, like the latter, it is not cancelled by ademption of the property, but is still payable out of the general assets, while, unlike general legacies, it does not abate on a deficiency of assets, except so far as it is payable out of the non-specific personalty. It is, however, of course, subject to the claims of creditors if the general assets are insufficient to satisfy their claims.

A specific legacy may be defined to be the gift, by will, of one or more articles, the render of which alone will satisfy the literal terms of the bequest. If the gift be of an abstract value, such as money or cash, a tender of the amount is a literal compliance with the direction in the will, and this request can be satisfied by the render to the donee of any pieces of coin

¹ *Ludlam's Estate*, 1 Harris, 188; *Walls v. Stewart*, 4 Harris, 281.

² See *Malone v. Mooring*, 40 Miss. 247; *Millens v. Smith*, 1 Dr. & Sm. 204; *Gilmer v. Gilmer*, 42 Ala. 9; *Manice v. Manice*, 1 Lans. (N. Y.) 348.

amounting in value to the sum bequeathed. But, a gift of "my brown horse," "the piano I bought at Clinton Hall," "my shares in the Harlem Railway Company," "the money in my green silk purse," &c., is specific, and points to certain articles the render of which alone can be a strict compliance with the testator's direction.

A specific legacy is always prefixed with a definite article or pronoun, such as *the* horse I bought from A. B., or *my* brown horse.¹ A bequest of "as many of my horses as will amount to \$800," is specific, for it can be made specific. *Id certum est*, &c. A bequest of "my brown horse" when the testator has only a gray one, is still specific. If he has two brown horses, parol evidence is admissible to show which was intended.

A specific legacy entitles the legatee to demand the particular article bequeathed, and not merely its value at the executor's choice. Therefore, where there is a bequest not of a particular fund, but of a sum out of it, this indicates a conversion of the fund by the executor for the purposes of the payment, rather than a specific render of the fund or any part thereof. So, a sum of money given out of a debt due to the testator, is general; *aliter*, if the gift was of the debt itself.²

A gift of money may be specific, if ear-marked, or particularly described, as the \$1,000 in my drawer, &c., or in the hands of C.,³ or the amount ordered under a certain decree of court,⁴ or the money in a certain bureau.⁵

A gift of \$50 apiece to A., B., and C. is general. So is a gift to invest in government securities, shares, bank

¹ 1 Roper, 193; see *supra*, Part I, Prop. III, *et seq.* as to inaccurate description.

² Sidebotham v. Watson, 11 Hare, 170; Ellis v. Walker, Amb. 309.

³ 1 Atk. 508; Ellis v. Walker, Amb. 309.

⁴ See Gilbreath v. Winter, 10 Ohio, 64.

⁵ Lawson v. Stitch, 1 Atk. 507.

stock, or even land.¹ The object² or motive of a gift cannot render it specific. The phrase "all I do³ or may⁴ possess" in the funds at my death confers a specific gift. The objection that a non-existing article cannot be adeemed, is frivolous. For, as a matter of fact, the will does not operate until the time of the testator's death, in respect even to specific gifts of already acquired property. But, if the testator, after making his will, acquires property of the kind bequeathed, he can afterwards adeem it, and, if he has it not, he cannot effectually bequeath it either generally or specifically.

A bequest of the horses the testator has in his stable, of the plate or library at a certain house, is specific.⁵ A gift of \$5,000 now out on mortgage is general, but a gift of *my* \$5,000 mortgage specific.⁶ A bequest of \$100; "or the value thereof in other property," is general, being evidently not specific, nor involving any choice of specific articles.⁷ But, where there was a bequest of \$5,000 consols, with a direction that, if the consols belonging to the testatrix did not reach that amount, the executor should raise the balance, the gift was held to be specific.⁸

The courts lean against construing legacies as specific. Therefore, a legacy of stock in general terms is not specific, even though the testator has stocks of the kind mentioned. The gift is merely equivalent to a direction that the executor purchase so much stock, if

¹ *Gibbons v. Hills*, 1 Dick. 324.

² 1 Roper, 203.

³ *Auther v. Auther*, 13 Sim. 423.

⁴ 1 Roper, 218; *Stephenson v. Dowson*, 3 Beav. 342.

⁵ *Stevenson v. Dowson*, 3 Beav. 342.

⁶ *Le Grice v. Finch*, 3 Mer. 50; *Chaworth v. Beech*, 4 Ves. 555; *Walls v. Stuart*, 16 Penn. St. 275, 281.

⁷ *Fagan v. Jones*, 2 Dev. & Batt. Eq. 69.

⁸ *Townsend v. Martin*, 7 Hare, 471.

the testator have it not at his decease.¹ In *Jefferys v. Jefferys*,² however, a gift of bank stock of the precise amount then owned by the testator, was held to be specific; in *Walton v. Walton*,³ a bequest of all the testator's interest in thirty shares in the Bank of the United States was held to be of the same nature; and in *Norris v. Thompson*,⁴ a bequest of bank stock shares was held to be specific, although the testator held a greater number of the shares in question.

The following gifts of debt are specific:—A bequest of the debt or “money now due me by A.,” or “in the hands of A.,” or “the money due me on the bond of A.,” or “my mortgage,” “my East India bond,” or “my note from D.”⁵ A bequest of part of a debt, if in similar terms, will be equally specific. But, if the gift is not of the fund itself, or any part thereof, though it is referred to as a source of payment or security for the legacy, the gift is demonstrative. This construction will prevail in doubtful cases, owing to the leaning of equity against specific gifts.⁶

Personal annuities are mere general legacies.⁷ But a rent charge or annuity charged only on land is specific. A general legacy, however, though charged on land, is not specific;⁸ neither is an annuity that is only primarily charged on land specific. If a testator charges his real estate with a sum of money, and then bequeaths that sum, this is a specific legacy, being equivalent to the capital sum of an annuity charged only on land. The question in all such cases is whether the gift is only

¹ *Webster v. Hale*, 8 Ves. 410.

² 3 Atk. 120; see *Webster v. Hale*, 8 Ves. 410.

³ 7 Johns. Ch. 258.

⁴ 1 C. E. Green, 218, 542.

⁵ 1 Rep. 227.

⁶ 1 Rep. 234.

⁷ *Lewin v. Lewin*, 2 Ves. Sen. 416.

⁸ *Creed v. Creed*, 11 Cl. & F. 491; s. c. 1 Dr. & W. 416.

primarily or solely charged on the property in question. If charged solely upon it, the gift is specific.¹

Annuities charged on land are thus usually specific, while a personal annuity for life is general.² A legacy of the whole or part of the proceeds of real estate is equivalent to a gift of an interest in land, and is, therefore, specific, though a charge of legacies on real estate is not thereby rendered specific.³

A gift of particular stocks or annuities, or of stock or annuities or particular funds is still general,⁴ even though the testator own such, unless he declares his intention expressly or by implication to bequeath such identical stock or part thereof. Unless he is thus explicit, the coincidence in amount of the bequest and of the value of the stock owned by him will not render the gift specific.⁵ The case of *Avelyn v. Ward*,⁶ but not that of *Ashton v. Ashton*,⁷ is inconsistent with *Purse v. Snaplin*. Roper successfully reconciles *Ashton v. Ashton* with *Purse v. Snaplin*, upon the ground that in the former case there was a trust to sell the shares or annuities in question, and this trust would be *insensible* unless the legacy was specific.

A bequest of stocks or shares will pass any of the denomination possessed by the testator at the time of his decease,⁸ and the legatee will be entitled to elect, if the number bequeathed be less than the amount owned by the testator. Such a bequest is general unless the shares are referred to in a specific manner as "my shares," or are otherwise identified.⁹ The case of *Av-*

¹ See 1 Rop. 197, 198; *Dickin v. Edwards*, 4 Hare, 273.

² *Hume v. Edwards*, 3 Atk. 693.

³ See *Creed v. Creed*, 11 Cl. & Fin. 491.

⁴ 1 Rop. 215.

⁵ *Purse v. Snaplin*, 1 Atk. 415.

⁶ 1 Ves. Sen. 420.

⁷ 3 P. Wms. 384.

⁸ See *Trinder v. Trinder*, L. R. 1 Eq. 695.

⁹ *Robinson v. Addison*, 2 Beav. 515.

elyn v. Ward,¹ which is to the contrary, seems to have been overruled.

A gift of money "in stock," "out of stock," "out of the dividends of stock," or of a personal annuity out of the dividends of stock, is general, and is not a gift of any specific stock.² For, the thing bequeathed is *money* and not stock.³

A gift of all the stocks the testator has or will have at the time of his decease is specific. For, that is specific which can be rendered such. *Id certum, &c.*⁴ A bequest of a certain amount "of the stock which I hold" in a specified corporation, is a specific legacy, and should be paid out of bonds of the estate, of the specified character, without abatement. But, a bequest "of five thousand dollars in railroad bonds" is a general legacy, and, if there is any deficiency of such bonds, it must be supplied out of the general assets of the estate.⁵

In Palsford v. Hunter,⁶ the legacy was of the value of securities, which were money bills then in the testator's possession. The money bills were afterwards paid by exchange bills, which remained on hand at the decease of the testator. The gift was held to be specific. Yet the term "value" was as general as a logician or political economist could desire. The case would hardly be followed at the present day. The conversion into somewhat similar securities, and the fact that these remained on hand should not, of course, affect a question of construction, which should be considered independ-

¹ 1 Ves. Sen. 420.

² See Deane v. Test, 9 Ves. 146.

³ 1 Rop. 221.

⁴ See Stevenson v. Dowson, 3 Beav. 342; Richards v. Richards, 9 Price, 219, 230.

⁵ Gilmer v. Gilmer, 42 Ala. 9; see Corbin v. Mills, 19 Gratt. 438.

⁶ 3 Br. C. C. 416.

ently of the event. The case of *Fontaine v. Tyler*¹ is not authority to the contrary, inasmuch as the legacy was virtually alternative, being specific if the testator had the stock bequeathed, and general if he had not. The will itself, in effect, directed that the value of the gift should be interpreted by the event. A similar though not exactly identical alternative provision is found in the case of *Foote*, appellant.²

A direction to invest a certain amount in government securities is a general legacy. But, *semble*, a direction to add to the testator's existing government securities up to a certain amount renders the whole gift specific. The former position, though refined, appears to be founded on the rule that the purpose for which a bequest is given never renders it specific. But, where part of the fund is specific, and the direction is to assimilate the remainder of the gift to the specific portion, the money gift, though apparently general, inasmuch as it comes out of the general assets, yet, seems to be specific in principle, by reference to the existing fund, to which it is attracted.³ Still, general legacies in substitution for specific legacies are not the less general.⁴ In *Taylor v. Martindale*,⁵ a testator bequeathed £10,000 3 per cents., and directed his executors to make up the deficiency, if he should not leave sufficient stocks, but he left £70,000 worth. The bequest was held specific. Here, however, the testator directed that his will should be interpreted by the court, and this constituted the whole gift specific.

As the courts lean against construing a legacy as

¹ 9 Price, 94, 104.

² 22 Pick. 299.

³ See *Taylor v. Martindale*, 12 Sim. 158.

⁴ See *Sparks v. Weedon*, 21 Md. 164.

⁵ 12 Sim. 158.

specific,¹ so, if the gift is of a sum of money, though mentioned as secured by a bond, note, or mortgage, the court will hold the legacy demonstrative.

Therefore, also, unless the gift is in its terms and by construction specific, it is not rendered so by the fact or event. Thus, a legacy of stock is not rendered specific by the fact of the testator's possessing the amount indicated at the time of making the will, or at his decease, unless there is a reference to such, as "my interest in such stocks," or "my shares,"² or some other definite allusion to particular stocks owned or intended to be owned by the testator. A direction that a legacy is not to be considered specific in respect to liability to ademption, however, will not prevent its retaining other specific incidents.³

A legacy of all of one's personal estate is necessarily, *ex vi termini*, general, even though given and limited in settlement with realty. A general bequest of personalty, however, if qualified by a reference to locality, is specific. It is for this reason that a bequest of all one's personal estate at B. is specific.⁴ So, if the testator shows that his intention is that the tenant for life of it should enjoy it specifically,⁵ the gift will be so construed.

In *Dormer v. Burnet*, A. bequeathed to B. "all the goods she brought into her house at D., except what are mentioned in a schedule." There was no schedule

¹ *Mayrant v. Davis*, 1 Desaus, 202; *Warren v. Wigfall*, 3 Desaus, 47; *Smith v. Lampton*, 8 Dana, 69.

² *Tift v. Porter*, 8 N. Y. 516; *Everett v. Lane*, 2 Ired. Eq. 548; overruled, *Davis v. Cain*, 1 Ired. Eq. 304.

³ *Jacques v. Chambers*, 2 Coll. C. C. 435; see *Ludlam's estate*, 13 Penn. St. 188.

⁴ *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Sayer v. Sayer*, 2 Vern. 688.

⁵ *Pickering v. Pickering*, 4 My. & Cr. 289.

found. It was held that the exception was void, but that no goods passed but those in the house at the date of the will. The phrase "now owned or possessed by me" will usually prevent after-acquired property from passing. But, a gift of my library now in B.'s custody has not this restrictive force. The word now in similar gifts of "sundries," or collective bequests, as of a flock of sheep, would probably be construed in the same way, as carrying any subsequent enlargement of the subject-matter of the gift. Accretions, such as bonuses, will pass under a gift of money secured by a policy of insurance,¹ at least in those States where the will speaks from the death of the testator, and the context is not to the contrary.

A charge upon land devised by will of a certain percentage on the value of the land is a pecuniary legacy, and passes to the surviving husband of the legatee.²

Though a general residuary clause is not specific merely because it enumerates some particulars, yet, a bequest of residue in a particular country or county is specific.³ So is a residue of certain stocks, after deducting previous specific bequests.⁴ The maxim *id certum est* applies to such cases.

In *Minor v. Dabney*,⁵ after an enumeration of certain articles, there was a gift of "all the estate not before devised." This clause, however, was construed to include merely articles of the same nature, *ejusdem generis*, as those enumerated, and, consequently not to be a general residuary devise.

Although a tenant for life of a specific bequest, or

¹ 1 Roper, 296; *Courtenay v. Ferrers*, 1 Sim. 137.

² *Gray v. McDowell*, 6 Bush. (Ky.) 475.

³ *Nisbett v. Murray*, 5 Ves. 149.

⁴ *Elwes v. Canston*, 30 Beav. 554.

⁵ 3 Rand, 191.

of a lease, enjoys it *in specie*, a tenant for life of a residue, or of the bulk of a testator's estate, has not the same privilege. The court converts terminable funds into public stocks, in order to equalize the income for the benefit of the tenant for life and the remainder-man.¹ Judge Redfield,² however, thinks the rule in *Howe's* case would not be acted on by the American courts. At all events, the same rules as to requiring security or an inventory from the tenant for life prevail in the American as in the English tribunals.³

Extra dividends or bonuses on shares belong to the tenant for life, and not to the remainder-man; and, if the shares are specifically bequeathed, the bonuses, if declared after the testator's death, belong to the specific legatee, and not to the general personalty.⁴

If a specific legacy is once converted by the testator, it is adeemed, even though the price of it, or the securities into which its price has been converted, continue in his hands.⁵ If a legacy, in terms specific, is not in reality such, owing to the testator's not having the whole interest or amount in the particular interest bequeathed, yet the legacy is construed as specific. Therefore, a bequest of 100 shares in the St. Louis Railway, while the testator has only 20 of such shares at the time of his decease, is good only for the 20.⁶ If he has more than 100 at his decease, only 100 will still pass.⁷ Gifts of specific legacies, however, usually speak from the date of the will.

As a gift of all of a testator's personal estate is

¹ *Howe v. Earl of Dartmouth*, 7 Ves. 137.

² Vol. II, 151.

³ *Covenhoven v. Shuller*, 2 Paige, 122, 132.

⁴ *Maclaren v. Staunton*, 7 Jur. N. S. 691; *Simpson v. Moore*, 30 Barb. 637.

⁵ *Gilbert v. Gilbert*, 29 Beav. 496.

⁶ *Gordon v. Duff*, 7 Jur. N. S. 746.

⁷ *Foote, ex parte*, 22 Pick. 299.

general¹ and not specific, the only principle on which the distinction between a gift of a residue of land and a gift of all one's personalty can be supported, rests on the primary liability of the personalty to the testator's debts. His personalty, therefore, as such, and not conveyed in terms necessarily specific, cannot be deemed of that nature. It is only apparently of a certain quantity or amount. From that value must be deducted the unknown and uncertain amount of testator's debts.

A donee of a specific legacy is entitled to have it given to him redeemed, if subject to any pledge, or to have it specifically replaced by other property of the same description, at the value of such legacy, at the end of a year from the date of the testator's death, if the subject-matter of the specific gift was improperly sold by the executor. If the chattel be of peculiar value, such as a painting or heirloom, the executor will be restrained by injunction from disposing of it, except to pay debts.

If a legacy is given for a particular purpose which cannot be effected, as to apprentice one or the like, the legatee, nevertheless, takes a vested interest in it;² and when a future period of distribution among children is contemplated by the will, all who are born during the life of the parent, or before the period of distribution, are entitled to a share.³

The court will not give a portion intended for a younger child to the person who, by the decease of his elder brother, obtains the family estate. This is on the same principle that renders it averse to give double portions.⁴ It will rather hold a legacy to be in satis-

¹ *Calkins v. Calkins*, 1 Redf. 337; but see *Worley v. Worley*, 1 Bailey Ch. 397.

² 2 Spence, 462, 466.

³ See *Viner v. Francis*, Tud. Lead. Cas. R. Prop. 2d ed. 702.

⁴ 2 Spence, 411-413.

faction of a portion, while it will not extend a portion raisable out of land, under a settlement, to the personal estate, at all, unless it is so directed by the testator, in which case the gift takes rank only as an ordinary legacy, unless otherwise directed in the will. A portion, too, is never raisable until required. These rules show a leaning to the heir or next of kin, and a disinclination to encumber or dismember inheritances.¹

But, the infant has an immediate right to interest, even though it is not charged in the will.²

As regards future legacies, the court will compel the executor to give security for their payment, or bring the fund into court.³ A remainder-man can likewise require the tenant for life to give security that the chattels will be forthcoming, if there is danger of waste. If there is no such danger, the remainder-man is only entitled to an inventory.⁴

A first legatee of chattels consumable by use can only get the interest arising from the chattels when converted into money, unless the bequest is specific. In this case he gets the thing itself for the time limited in the will.⁵ A like rule applies where the legacy comprises some things of a permanent character.⁶

If legacies abate, owing to a deficiency of assets, and the testator had provided expressly for such deficiency, a fund subsequently arising from trusts that fail goes to the residuary legatee, and not to replace the abatement made in the legacies.⁷

¹ 2 Spence, 398.

² 2 Rop. Leg. 1257, 1348, ed. 4.

³ Story Eq. Jur. 603.

⁴ Story Eq. Jur. 604.

⁵ *Rapalye v. Rapalye*, 27 Barb. 610.

⁶ 2 Paige, 122 ; 3 Mer. 193.

⁷ *Dudman v. Sheriff*, 18 W. R. 596.

§ 3. *Payment of legacies—Interest.*

A legatee cannot compel payment before a twelve-month from the death of the testator,¹ even though he otherwise directs in the will. The legatee must, of course, be willing to perform any condition precedent.² Interest is recoverable from the time when the legacy is payable.³ But, if it is a gift of residue, or of a sum to the executor to invest for the benefit of the legatee, or is in satisfaction of a debt, or is charged on land only,⁴ or is given to a widow in lieu of dower, or for a child of the testator, and the widow or child is otherwise unprovided for in the will, the legacy so bequeathed bears interest from the death of the testator, and, in the last case put, the child will be entitled to interest, even though the possession of the fund is deferred,⁵ if his maintenance is not otherwise provided for. These rules do not apply to grandchildren.

Specific bequests will carry all gains accruing, like bonuses, by way of accession, and all interest earned thereon after the death of the testator.

If the postponement of the enjoyment of the *corpus* of a legacy given to a child is for some reason personal to the child, as, for instance, until he attains age, the gift bears interest only from a twelve-month after the testator's death.

A legacy carries interest from the date at which it vests,⁶ and, when it vests in possession, it is then at once payable, provided that a twelvemonth has elapsed from the date of the testator's death. But, where property is limited to A. for life, remainder to B., B.'s re-

¹ *Hoyland v. Schenck's Estate*, 1 Harrison, 370.

² *Curtis v. Potter*, 1 Houst, 382; see Redfield on Wills, Vol. II, p. 466, and notes.

³ *Taylor v. Hibbert*, 1 Jac. & W. 308.

⁴ *Pearson v. Pearson*, 1 Sch. & Lef. 10.

⁵ *Pollard v. Pollard*, 1 Allen, 490.

⁶ *Barber v. Barber*, 3 My. & Cr. 688; *Harris v. Finch*, McLel. 141.

mainder, though vested, does not bear interest, that being expressly given to A. during his life.

A conditional or contingent legacy does not bear interest, except that where the gift is to a minor, otherwise unprovided for, the court will give the interest even before the gift vests,¹ provided the interest is not meantime otherwise disposed of. If the gift is vested, though subject to be divested, as, if the minor do not attain age, he is, of course, entitled to interest under the general rule as having a vested interest, even though he may die under age, and the gift over then take effect. Where the first interest is contingent, the interest accumulates for the benefit of the vested gift in remainder.²

If an annuity is bequeathed, interest is due one year from the testator's death; in other words, it bears interest from his death. But, interest is not due on a general legacy until two years have elapsed from the date of the testator's death,³ because the executor is allowed a year to collect and realize the assets.

On a devise to an infant, and, in case he die without issue before majority, over, the infant can only require the income meantime.⁴ A provision for maintenance, however, will not always be limited to the interest of the fund.⁵ As to deducting advances, see *Morton v. Morton*⁶ and *Bunner v. Storm*.⁷

In appointing a guardian in the State of New York, it is not necessary to pursue the words of the statute.⁸

¹ *Pinney v. Fancher*, 3 Bradf. 198.

² 2 Wms. Ex'ors, 1290.

³ *Gibson v. Bath*, 7 Ves. 89; *Bitzer v. Hahn*, 14 Serg. & R. 232.

⁴ *Bradley v. Amidon*, 10 Paige, 235.

⁵ *Van Vechten v. Van Vechten*, 8 Paige, 104; *King v. Woodhull*, 3 Edw. 79; see *Craig v. Craig*, 3 Barb. Ch. 76; *Wood v. Cone*, 7 Paige, 471; *Stewart v. Chambers*, 2 Sandf. Ch. 382.

⁶ 2 Edw. 457.

⁷ 1 Sandf. Ch. 357.

⁸ *Corrigan v. Kiernan*, 1 Bradf. 208.

A devise of rents is equivalent to a devise of the land itself.¹ In Ruppert's estate,² no disposition was made of such income as might accrue on each child's share of the real estate after that child should attain majority. It was held that such income must remain in the hands of the trustees until final distribution, and then be distributed among the residuary legatees. A testator gave property to his wife "for her benefit and support and the support of his son." It was held that half the income was for the wife's support, and half for that of the son.³ For a decision under the 1 N. Y. Rev. Stat., 726, § 40, with respect to a beneficiary being entitled to accumulations, as being "the person presumptively entitled to the next eventual estate," see Schettler v. Smith.⁴

A tenant for life of the interest of a fund is virtually tenant for life of the principal, and entitled to its possession upon securing the interest of those in remainder.⁵ As to interest, see, further, Cooper v. Scott.⁶

§ 4. *Specific devises.*

Devises of freehold and bequests of chattel land are specific, whether given as a residue or by particular description.⁷ But, in Blaney v. Blaney,⁸ Metcalf, J., said that the English rule, which regarded a devise of land as specific is destroyed by a statute which enables

¹ Schryer's Estate, 2 Brews. (Pa.) 526.

² 1 Tuck. (N. Y. Surr.) 480.

³ Loring v. Loring, 100 Mass. 340.

⁴ 41 N. Y. 328.

⁵ Parker's App. 61 Pa. St. 478.

⁶ 62 Pa. St. 139; Leddel v. Starr, 20 N. J. Eq. (5 C. E. Gr.) 274; Devlin's Estate, 1 Tuck. (N. Y. Surr.) 460; Fish's Estate, 1 Tuck. (N. Y. Surr.) 122.

⁷ Gibbons v. Eyden, L. R. 7 Eq. 371; see Clark v. Clark, 11 Jur. N. S. 820.

⁸ 1 Cush. 107, 116.

the testator to dispose of after-acquired lands. A contrary doctrine prevails in England. On principle, the present English doctrine seems the sounder. The rule established by the Revised Statutes of New York, the 1st Vict. c. 26, and the analogous Revised Statutes of Massachusetts, &c., applies only to the disposing power of testators who use general language, but does not affect the inherent specific nature of a devise of land. Those statutes, too, were not intended to work any change in the law of specific devises.

In *Walker v. Parker*,¹ a devise of "the balance of my real estate, believed to consist of lots numbered six," &c., was held to be specific, though, in *Blaney v. Blaney*,² it was held that a residuary devise of land is not specific, where, as in Massachusetts,³ there is a statute which operates to pass lands acquired after the making of the will.

Where there was a specific devise to a wife of one-third part of the testator's real estate for life, remainder to his son, followed by specific devises to the son and to other persons, it was held that the devise to the wife was to be satisfied out of the whole estate, and not exclusively out of the specific devise to the son.⁴

As to the effect of a residuary devise to passing land, a specific devise of which was revoked by a change of interest in the testator, see *Bosley v. Bosley*.⁵

§ 5. *Residue—Realty.*

A residuary devise⁴ of realty does not comprise either lapsed or void devises, except where a local stat-

¹ 13 Pet. U. S. 166.

² 1 Cush. 107.

³ Rev. Stat. c. 62, § 3.

⁴ *Walker v. Parker*, 13 Pet. 166.

⁵ 14 How. 390.

⁶ *Van Kleeck v. Reformed Dutch Church*, 20 Wend. 457.

ute is in question. But, a residuary bequest of personalty includes such ineffectual gifts.¹ They will likewise be included in case of a revoked disposition.² Sometimes, however, owing to the context, a residuary legatee takes only a part of the residue.³

As specific sums given out of real estate directed to be sold fall to the heir, and not to the residuary devisee, when the trust for sale is void, authority as well as principle seem to imply that the heir, and not the residuary devisee, should take void as well as lapsed devises. The true foundation of the rule, however, is the favor shown to the heir by the law. He must take in a doubtful case, and as a residuary devise of land is specific, it seems rather strong to hold that it includes specifically what is intended to be specifically given to another.

If the specific devisee takes only a partial interest, and not the fee, the residuary devisee, of course, takes the remainder; for, unless it is expressly limited to the heir.⁴ If the specific devisee is also the residuary devisee, he will still be preferred to the heir.

In England and several of the American States at present, a will of land speaks from the death of the testator, and residuary devises include lapsed and void devises. In cases arising under such statutes, therefore, few cases of difficulty can occur. A residuary devise, accordingly, is held, under these enactments, to include all rents not expressly disposed of.⁵

As a contingent residuary bequest carries prior income,⁶ Jarman thinks⁷ that a contingent residuary

¹ *Bowers v. Smith*, 10 Paige, 193.

² *Kip v. Van Cortland*, 7 Hill, 346.

³ *King v. Woodhull*, 3 Edw. 79.

⁴ *Smith d. Davis v. Saunders*, 2 Bl. 736.

⁵ But see *Brailsford v. Heyward*, 2 Desaus, 32.

⁶ *Trevanion v. Vivian*, 2 Ves. Sen. 430.

⁷ Vol. I, 595.

devise should have the same effect. On the other hand, as a contingent or future specific devise does not carry the income meantime, and as a residuary devise is still specific, it is doubtful whether it ought to attract the previous income. The better opinion appears to be that it should not carry the income in question. The rights of the heir are to be strictly guarded. Jarman's reasoning to the contrary proves too much. It is equally applicable to specific devises. But, although a future estate in land does not carry the intermediate rents, yet, if the real and personal estate be mixed up in one fund, the whole property is then impressed with the nature and incidents of personalty, and the future estate will attract the intermediate rents.¹

In *Tucker v. Tucker*,² it was held that a void devise only falls into the residue, when the particular devisee of the void gift is also residuary devisee, and no statute provides to the contrary. However, both in England and most of the States, at present a residuary devise comprises lapsed and void devises.³ The heir, even when a particular devisee,⁴ and not the residuary devisee, takes undisposed-of realty.⁵ The residuary devisee, of course, takes all remainders after express devises for life.⁶ A lapsed gift of money arising from the sale of realty falls to the heir. But, a residuary devisee of testator's "property" takes land sought to be conveyed by a void devise in the will.⁷

¹ *Genery v. Fitzgerald*, Jac. 408.

² 1 Seld. 408.

³ 1 Vict. c. 26, § 25; *Frazier v. Frazier*, 2 Leigh, 642; *Redfield on Wills*, Vol. II, 174.

⁴ *Tongue v. Nutwell*, 13 Md. 415.

⁵ *Ridgely v. Bond*, 18 Md. 433; *Van Kleet v. The Reformed Dutch Church*, 6 Paige, 600.

⁶ *Cline v. Latimer*, 1 Winst. Law, 207.

⁷ *Morris v. Henderson*, 37 Miss. 492.

§ 6. *Residue—Personalty.*

A residuary bequest comprises lapsed and void bequests,¹ though, if the gift relates to land, the heir, as already stated, and not the residuary devisee, takes what is void as well as what lapses, notwithstanding that it has been doubted whether he takes void gifts.² This distinction between residuary legatees and devisees obtains in America as well as in England.³ A legatee of a portion of the residue, however, will not take a lapsed or void gift of another portion of the residue.⁴ Such gifts will enure for the benefit of the next of kin.⁵

A residue is generally bequeathed by the words "rest and residue;" but, any equivalent expression renders the gift residuary. The phrase "goods, chattels and effects," will amount to a general residuary gift.⁶ The word "effects" is still more comprehensive than "goods and chattels," and will comprise things in action. Sometimes, however, general words are construed merely as a sort of *et cetera* to the articles previously enumerated, and not to amount to a gift of the residue, especially if there are particular legacies given afterwards to the donee of the residue himself or to others.⁷ But a gift of "all the rest, residue and remainder of my estate and effects" will not be construed as restricted to articles afterwards enumerated,⁸ unless there is another gift of the residue. In *Anison v. Simpson*,⁹ a bequest of

¹ *Banks v. Phelan*, 4 Barb. Sup. Ct. 80; *James v. James*, 4 Paige, 115; *Peay v. Barber*, 1 Hill Ch. (S. C.) 95.

² *Van Kleet v. the Reformed Dutch Church*, 6 Paige, 600.

³ *Redfield on Wills*, Vol II, 117.

⁴ *Skrymsher v. Northcote*, 1 Swanst. 566.

⁵ *Sykes v. Sykes*, Law Rep. 3 Ch. App. 301.

⁶ See *Hearne v. Wigginton*, Mad. & Geld. 119.

⁷ *Crichton v. Symes*, 3 Atk. 61.

⁸ *Fisher v. Hepburn*, 14 Beav. 626.

⁹ *Johns. Eng. Ch.* 43.

"furniture, goods, ready money, debts and securities," was held to carry the residue. Except with a friendly context, however, the words "goods," "money," &c. will not carry the residue.

A gift of the residue is often construed to mean a particular legacy, and, as such, not to abate except rateably with the other legacies. But the courts are disinclined to this construction, if it work a partial intestacy.¹ A general residuary clause will, therefore, operate as an execution of a power.²

§ 7. *Cumulative Legacies.*

If two or more legacies of the same specific article, or of the same interest or sum of money are given in the same will, or the same codicil, to the same person, the second gift is presumed to be a repetition of the prior one and to confer no new interest, unless the context is to the contrary.³ But if the gifts are in separate testamentary instruments, or if they differ in amount, they are presumed to be cumulative,⁴ unless the presumption is rebutted on the construction of the whole will.

If the same motive is expressed for conferring both gifts, or if other coincidences are apparent between the two donations, such resemblances strengthen the presumption that the legacies are not cumulative. On the other hand, the contention for accumulation will be strengthened by any differences between the two gifts, whether the diversity of the latter be found in the amount, in the character in which it is given, in the mode of enjoyment, in the extent of interest, or in the

¹ Crooke v. De Vandes, 9 Ves. 197.

² Bangs v. Smith, 98 Mass. 270.

³ Suisse v. Lowther, 2 Hare, 424, 432.

⁴ Hooley v. Hatton, 1 Br. C. C. 390 n; see Ridges v. Morrison, 1 Br. C. C. 389.

motive for the bounty.¹ But, if no such element is found in the context, the general presumption against double legacies will prevail, if these are in the same instrument.

Sometimes a variation of circumstance is a proof of the identity of the two legacies, as where a gift is given to a married woman, and it is afterwards given her for her separate use; the construction is that the second limitation was merely instituted for caution's sake.²

If the gifts, however, whether the same or not in amount, are in different instruments, or vary in their dates of payment, or in the conditions respecting their vesting, or the like, the presumption is that they are cumulative.³

If the gifts are in different instruments, mere coincidence in amount will not rebut the presumption that the legacies are cumulative. But if the same motive is expressed for bequeathing both gifts, and their amount is the same, this double coincidence will render the legacies repetitive merely,⁴ unless the second instrument is essentially in substitution for, and not in addition to, the first.

If there is a repetition of several gifts, this shows that none at all of the new legacies was intended to be cumulative.⁵ The word "besides," however, in the second instrument, will show that the gifts were intended to be cumulative.⁶

¹ See *De Witt v. Yates*, 10 Johns. 156.

² *Greenwood v. Greenwood*, 1 Br. C. C. 30; *Wilson v. O'Leary*, 20 W. R. 28.

³ *Wray v. Field*, Mad. & Geld. 300; *Hoffman, Admr. v. Cromwell*, 6 G. & J. 144.

⁴ *Hurst v. Beach*, 5 Mad. 351.

⁵ *Coote v. Boyd*, 2 Br. C. C. 521.

⁶ *Guy v. Sharp*, 1 My. & K. 589.

As regards repetitions of specific, as distinguished from demonstrative, gifts, they cannot be cumulative.¹ If, in different wills, as distinguished from a will and codicil, they are not *prima facie* cumulative, as a subsequent will is substitutional for a prior one, whereas a codicil is an addition to it.

The rules respecting repeated legacies may be thus summarized. A specific legacy, though bequeathed in different instruments, passes only once. Two legacies of quantity, of equal amount, in the same instrument, pass only once. But, if the legacies are unequal in amount, or are limited on different contingencies,² though in the same instrument, or of equal amount but in different instruments, the gifts are cumulative.

The American courts, it is to be remembered, lean rather strongly against accumulation, although, in the absence of any clue in the context, they would doubtless interpret the disposition itself according to the English rules.³

In *Hurst v. Beach*,⁴ Sir John Leach rejected parol evidence intended to show that a legacy of £500 in a codicil, was substitutional for a legacy of £300 in a will. He said such evidence was admissible only when the presumption was against the letter of a will. This is an important doctrine with respect to the admissibility of parol evidence.⁵

¹ *Duke of St. Albans v. Beauclerk*, 2 Atk. 636.

² *Jones v. Creveling*, 4 Har. 127.

³ See *Cunningham v. Spickles*, 4 Gill, 280; 1 Zabriskie Rep. 573; 2 Lomax on Exors. 173, 176, 2d ed.

⁴ 5 Madd. 351.

⁵ See Part I, 271, *et seq.*

CHAPTER XXV.

ADMINISTRATION OF ASSETS.

§ 1. *General principles.*

Assets are legal or equitable. Legal assets are those which the executor takes by operation of law, and which creditors could attach in a court of law. Equitable assets are those which the executor takes by an express charge of the testator, and which a creditor could only reach through a court of equity. Assets are thus denominated legal or equitable according to the kind of remedy open to the creditor, and not according to their own nature. For, an equitable estate is legal assets, if any statute enables the creditor to seize and appropriate such property at law.¹ An equity of redemption, therefore, constitutes legal assets² in the United States. So does any fund undistinguishable from the testator's own personalty.

Equity follows the law as regards legal assets, and also gives priority to specific charges according to their dates. But, where the assets are not legal, or the charge specific, the court administers the assets *pari passu* among all the creditors, and then among the legatees. If the fund is insufficient to pay all the creditors, they must abate *pro rata*, and so must the legatees, if the fund, though adequate to meet the claims of the creditors, is insufficient to satisfy all the legacies, unless the testator have otherwise directed.³

¹ See *Silk v. Prime*, 2 White & Tud. Lead. Cas. and notes thereto, 2d ed. 82, 95, *et seq.*; Story, 551, 552; 2 Spence, 314, 315.

² 4 Kent, 5th ed. 161; Judge Perkins' notes to 2 Jarm. 545; *Van Ness v. Hyatt*, 13 Peters, 294.

³ Story, 554-6.

A few observations only are required on the order of administering assets for debts and legacies charged on land.

As to debts, a trust for their payment renders them payable, not in distinct classes, as special and simple, but *pari passu*. Debts barred by the statute of limitations are not revived by such a charge,¹ although, in England, it will prevent the statute from running in favor of the testator's real representative, but not in favor of his executor, as to whom the charge is inoperative, being expressive only of his common law duty.² Neither does such a charge make simple contract debts bear interest.

The *pari passu* rule is applied to charges as well as devises in trust, and to the latter even though the executors are the devisees in trust. Specialty creditors, availing themselves of such a charge, must allow the simple contract creditors to share rateably in the personality, as it is a maxim of equity, that he who seeks equity must do equity; and another maxim is, that equality is equity. But if the creditor wishes or has any specific charge, he is not bound by rules of administration, which only apply as between the testator's beneficiaries.

The following is the order of administering assets for creditors: 1. The general personality; 2. Any estate in land expressly devised for payment of debts; 3. Estates descended;³ 4. Specific bequests and devises charged with debts;⁴ 5. General legacies, *pro rata*;⁵ 6. Residuary devises; 7. Specific legacies and devises;

¹ See *Stackhouse v. Barnston*, 10 Ves. Sumner's ed. 453, note b.

² *Moore v. Petchell*, 22 Beav. 172.

³ *Adams v. Brackett*, 5 Met. 280.

⁴ *Hubbell v. Hubbell*, 9 Pick. 561.

⁵ *Humes v. Wood*, 8 Pick. 418.

and 8. Personalty and realty appointed under a general power. In England, it has been held¹ that classes 6 and 7 are virtually the same, as a residuary devise there is held to be specific, even in wills made since 1 Vict. c. 26, under which after-acquired lands pass, as the will only speaks from the death of the testator. A different rule prevails in America, under similar enactments,² although prior thereto, every devise of land in terms, however general, was held to be specific.³

In the order of satisfaction, creditors are preferred to legatees; specific legatees are preferred to the heir and to the devisee of land charged with debts, and to a residuary devisee. But, general pecuniary legatees are not preferred to residuary devisees of land, and, *a fortiori*, not in England, where a residuary is still a specific devisee. Specific devisees of land not charged with debts are in the same rank as specific legatees. If a particular portion of the personalty is bequeathed, subject to the payment of debts and legacies, then, as between the legatees, the residuary personalty is exonerated, if there is a residuary bequest, but not where there is no gift of the residue.⁴ A devisee even of mortgaged premises is preferred to the heir-at-law, if mortgaged and unincumbered lands are specifically devised, but, after payment of debts, both classes of estates contribute rateably to the mortgage debt.⁵

The personal estate of a testator, in America, is primarily liable for all his debts, even to those by mortgage.⁶ Lands, however, are auxiliary assets in most of

¹ *Pearman v. Twiss*, 2 Giff. 130. ² *Blaney v. Blaney*, 1 Cush. 107.

³ *Mirehouse v. Scaif*, 2 Myl. & Cr. 695; see Rev. Stat. Mass. c. 62.

⁴ Story Eq. Jur. 571.

⁵ Story Eq. Jur. 571; Smith's Manual Eq. Jur. 283, 1st Am. ed.

⁶ *Wyse v. Smith*, 4 Gill. & J. 295; *McDowell v. Laules*, 6 Mon. 141; *Chase v. Lockerman*, 11 Gill. & J. 185; *McCampbell v. McCampbell*, 5 Litt. 95.

the States, just as they are in England since the 3 & 4 W. 4, c. 104. But, it is doubtful whether the common law rule does not still prevail in Virginia and Kentucky.¹

A devisee of a mortgaged estate is not entitled to exoneration out of a specific legacy, but takes subject to any charge thereon, even where his old rights to exoneration are left untouched by any recent statute. Where debts are charged on a devise, the devisee, in point of principle, ought to be liable for the debts before the heir. Yet the contrary has always been the law,² unless there was a devise also to the heir.³

If personalty and land are expressly charged, both contribute *pro rata*, whether mixed up in a common fund or not,⁴ although the residue reverts to the heir or next of kin, according as it is primarily personal or real. Different lands or specific gifts of realty and personalty, when liable to a common charge, contribute *pro rata*.⁵ Specific legacies, however, do not abate with general legacies.

An appointment under a general power is assets, though the power itself is not, as, to be operative at all, it must be exercised. A trust power is assets for the creditors and legatees of the intended appointees, but not for those of the appointer.⁶

§ 2. *Marshalling of assets.*

Although marshalling relates to administration rather than to construction, yet, as it is a consequence

¹ 4 Kent, 5th ed. 421, 422, and notes.

² *Manning v. Spooner*, 3 Ves. 114.

³ *Brederman v. Seymour*, 3 Beav. 368.

⁴ See *Swoope's App.* 27 Penn. St. Rep. 58; *Witman v. Norton*, 6 Binn. 395.

⁵ *Livingston v. Livingston*, 3 Johns. Ch. 148.

⁶ See *Williams on Real Assets*, also chapter XVII, *supra*, § 2.

of legal interpretation¹ and as the doctrine may rest upon, and influence to some extent, the construction of a will, a brief notice of the equitable rules for marshalling assets seems necessary for the completeness of our enquiry. The principle of the doctrine of marshalling is, that where one creditor can at law reach two or more funds, and another creditor cannot reach all these assets of their common debtor, the former will be presumed to seek satisfaction only out of the funds exclusively available to him, so far as the claims of the other creditors against the common debtor are concerned. If, then, the best circumstanced creditor exhausts at law the funds alone available to the other or restricted creditor, the latter in equity is allowed to stand *pro tanto* in the shoes of the former, and is deemed to have an implied transfer of his claims.² Therefore, of the various classes of property and gifts specified, *supra*,³ if the creditor seizes the property in a lower class, the donee of a gift in the latter will be reimbursed out of the interests more immediately liable; in other words, such property or assets are marshalled in his favor.

The practical test of a right to marshal is easily understood. If a beneficiary find that any one else has on the testator's assets a claim which, if satisfied one way, will defeat the gift to himself wholly or in part, but which may be satisfied in some other way without having this effect, the legatee can compel the creditor to confine himself to the latter fund, or else the legatee may stand in his place until compensated. The court so arranges the claims and the funds as to carry out as far as possible, *ut res magis valeat*, the claims of

¹ See *Hensman v. Fryer*, L. R. 2 Eq. 627; *contra*, *Eddels v. Johnson*, 1 Giff. 22; *Pearman v. Twiss*, 2 Giff. 130.

² See *Aldrich v. Cooper*, 2 White. & Tud. Lead. Cas. 2d ed., *et seq.*

³ Pp. 354-5.

the various classes of creditors, legatees, and beneficiaries.

Marshalling¹ is adopted not only in favor of any class of creditors but of legatees, (except residuary legatees, where the residue is not exonerated by the testator), portionists, heirs at law, and devisees, and as against simple contract creditors in favor of legatees, and also against a surety for a first mortgagor in favor of a second mortgagee.²

Legatees are substituted for creditors by specialty as against real assets descended. Legatees are likewise put in place of a mortgagee who has exhausted the personalty, whether the mortgaged lands have descended to the heir at law or been devised burdened with the mortgage.³ Marshalling is also allowed, of course, to legatees when the personalty is exhausted by creditors, although there is a trust for payment of debts, and even where there is no trust, in all the States where land is assets for simple contract creditors.⁴

A devisee or specific legatee of a chattel mortgaged is entitled to exoneration out of the general personalty, even though the mortgage have been with a power of sale, by exercising which the mortgagee could, during the testator's lifetime, have defeated the gift *in specie*. So it has been held that a legatee of shares or stocks is entitled to have future calls paid out of the general personalty.⁵ This seems to be a very hard case, and an undue extension of a somewhat technical rule. But legatees whose gifts are out of a residue have, *ex vi termini*, no claim to anything but what is left after satisfying all legal demands. Neither has a legatee any equity of marshalling against a devisee, whether

¹ Story Eq. Jur. 562-566.

² See *Louth v. Bloxam*, 2 Hem. & Mil. 457.

³ *Surtees v. Perkins*, 19 Beav. 406.

⁴ Story, 566.

⁵ *Blomt v. Hopkins*, 7 Sim. 51.

specific or residuary,¹ of unincumbered land. But he has against a legatee whose gift is charged on land.² Assets are not marshalled in favor of charities in England and most of the States, as the mortmain laws, being also rules of public policy, are therefore stronger than ordinary laws, whether common or statutory. In the United States, the reluctance of the courts thus to marshal is perhaps a consequence of its general indisposition to adopt a *cy pres* construction or administration.

Marshalling is allowed as between simple contract creditors and a vendee of land, and as between legatees and the testator's heir or devisee,³ in respect of the vendor's lien for unpaid purchase-money, where the matter is not provided for by a statute. This relief, however, is rarely given against a devisee in the United States.⁴ The value of a specific gift is owing to the doctrine of marshalling, as it compels any chargeant on the subject of the specific gift to resort to the general personalty, or else entitles the specific donee to do so. Marshalling is allowed in favor of a widow's paraphernalia. As to foreign assets, the intention of the testator determines the funds for payment in cases of testacy. But, the priorities of creditors are adjusted according to the laws of the testator's domicil.⁵

In *Promise v. Abingdon*,⁶ a legatee who died before the time for paying his legacy, which was charged on land, had elapsed, and who thereby lost his hold on the realty, was held to have no claim to marshal. The case, however, is obscure, and is disapproved of by Jarman.⁷

Marshalling is not enforced against a purchaser for

¹ See *Hensman v. Fryer*, L. R. 2 Eq. Cas. 627, *contra*.

² 2 Spence, 820, 830; 2 Story, 565.

³ Story, 564a; 2 Sp. 833; *Sproule v. Prior*, 8 Sim. 189.

⁴ Judge Perkins notes to 2 Jarm. 601, and cases there cited.

⁵ *Wilson v. Dunsany*, 18 Beav. 293.

⁶ 1 Atk. 482.

⁷ Vol. II, 608.

value without notice, at least if the party claiming to marshal is *priusne* in the order of time to the security he seeks to marshal against. For, where the equities and laws are equal, priority in time prevails.¹

§ 3. *Ademption of legacies.*

Ademption is a mode of satisfaction or payment, and not a question of construction. Therefore, where a testator gives a legacy for a particular purpose and afterwards gives the legatee the same sum for the same purpose, this is an ademption,² even where the testator is no relative of the legatee.

A testator advanced money to a husband whose wife would be at his death an heir and distributee of the testator, and directed that the husband should be debited with the amount, that it might be deducted after the testator's death "from the share coming to the family." It was held that such sum was not to be deducted from a legacy given to the wife by a subsequent will.³

A legacy to a creditor is a satisfaction of the debt; so a legacy to a child is deemed to be a satisfaction of a portion. But these presumptions of equity may be rebutted or supported by parol evidence even of the testator's intention.

All legacies, it is to be remembered, abate *pro rata* in case a posthumous child is born to the testator, who made no provision either in the will or otherwise for it. A legatee to whom, alone, endearing expressions are used, nevertheless must abate whenever a *pro rata* contribution is legally made on legatees.

¹ *Averall v. Waile*, L. & C. Temp. Sugden, 252.

² *Monck v. Monck*, 1 Ball & B. 298.

³ *Gallego v. Gallego*, 2 Brock. 286.

§ 4. *Ademption of specific legacies.*

A specific legacy becomes adeemed when the testator parts with the subject-matter of the gift, or alters its form so that it can no longer be identified. Thus, a specific legacy of a gold chain is adeemed by its sale or its being melted.¹ A legacy of a debt is adeemed by its being paid to the testator, and a part payment operates as an ademption *pro tanto*. Stock specifically bequeathed is likewise adeemed to the extent to which it is sold by the testator,² even though he purchases more of the same kind.³ If the goods which are the subject of a specific bequest have been destroyed by accident during the life of the testator, or perish with him at sea, or never were his property, the legacy is adeemed.⁴ A legacy, *semble*, is not held to be adeemed in America on slight variations of its nature or investment.⁵

Ademption is not occasioned by pawning;⁶ neither does any necessary removal of furniture, books, &c., specifically bequeathed as at a certain place, work an ademption. A lease, if a legal one, has been deemed in England to be so altered by renewal as not to pass under a previous specific gift.⁷ But it is not likely that this doctrine, if at all valid at the present day, even in England, would be extended to leases renewed under a covenant for perpetual renewal, unless the surrenderor of the old lease obtained some advantage by the surrender.

¹ *Ford v. Ford*, 3 Foster, 212; *Donahue v. Lea*, 1 Swan (Tenn.) 119.

² *White v. Winchester*, 6 Pick. 48; *Welch's App.* 4 Cas. 363.

³ *Pattison v. Pattison*, 1 M. & K. 12.

⁴ See 2 Redfield on Wills, p. 431; *Havens v. Havens*, 1 Sandf. Ch. 324; *Smith v. Jones*, 4 Ohio, 115.

⁵ See *Walton v. Walton*, 7 Johns. Ch. 253; *Cogdell's Ex'ors v. His Widow*, 3 Desaus, 346.

⁶ See *Walton v. Walton*, 7 Johns Ch. 265; *Hoke v. Herman*, 9 Harris, 301.

⁷ *Abney v. Miller*, 2 Atk. 593.

It has been held here that a bequest of a lease which is specific, is not adeemed by a renewal in the lifetime of the tenant for life,¹ *semble*, even though the renewal be more beneficial than the interest bequeathed.² The fees and other cost of renewal will be apportioned between the tenant for life and remainder-man.³ A conversion by operation of law or by statute, or by an accident, does not work an ademption.⁴

Yet, a legacy given to A., and, if he die with out issue, then to B., will be adeemed as to both by a subsequent gift to A.⁵

Where a testator sold all his personalty and made the notes payable to the legatees, it was held that the sale worked an ademption of certain legacies, but that, under the circumstances, the notes belonged to the legatees.⁶ In *McNaughton v. McNaughton*,⁷ however, after a devise of land for life, remainder in trust for sale on certain trusts, the testator sold the land. This was held to adeem both the life estate and the trusts of the proceeds of sale.

A legacy revoked, adeemed or satisfied is not revived by a republication of the will, or by a codicil, though this may always pass lands acquired after the date of the will.⁸ But, if, after the ademption of the subject of a specific legacy, the testator acquires similar property, and republishes his will or makes a codicil, the specific legacy will be revived.⁹

¹ *Covenhoven v. Shuler*, 2 Paige, 122.

² *Doe v. Porter*, 3 T. R. 13.

³ See 1 Rep. on Leg. 318.

⁴ *Walton v. Walton*, 7 Johns. Ch. 258; *Warner v. Beach*, 4 Gray, 162; *Verdier v. Verdier*, 8 Rich. (S. C.) 135; but see *Hoke v. Herman*, 21 Penn. (9 Harris,) 301.

⁵ *Twining v. Powell*, 2 Coll. 262.

⁶ *Logan v. Deshay*, Clarke Ch. 209.

⁷ 34 N. Y. 201, affirming 41 Barb. 50.

⁸ 2 Williams on Ex'ors, 1199, Am. ed.

⁹ 2 Williams on Ex'ors, 1200, Am. ed.

The common law rule that alienation adeems a specific bequest is modified in Kentucky so as not to apply to bequests to testator's heirs, unless the testator so intends.¹ Where, however, bonds given as a general legacy proved worthless, it has been held in Alabama that the legatee takes nothing on account thereof.²

§ 5. *Satisfaction of debts by legacies.*

Whenever a person is bound by covenant or other obligation to give or appoint a certain interest or sum to an individual or class, any gift capable of being construed as a discharge of such obligation will be so held. Equity, besides, inclines against double gifts of every kind whether they be legacies to creditors or portions, although it is said in *Thynne v. Lord Glengall*,³ that this presumption does not apply to gifts to creditors. In these cases, as the amount of the legal liability affords a clue to some external evidence of the testator's intention to be just only and not generous, the courts have adopted the rule that where a creditor bequeaths a legacy of an equal or greater amount than the debt, and payable after the debt falls due, the legacy is only in satisfaction of the debt.⁴

If the legacy is expressed to be given for a particular motive or object, or if it is not equally as beneficial in every respect as the debt, the gift is not presumed to be a satisfaction of the legal liability even *pro tanto*. If the debt is in the nature of unliquidated damages, a floating balance, or temporary bill of exchange, the legacy will be deemed to have no reference to the debt. So, if the will contains a direction to pay debts, the court endeavors

¹ *Lilly v. Curry*, 6 Bush (Ky.) 590.

² *Gilmer v. Gilmer*, 42 Ala. 9; see *Johnson v. Farrell*, 64 N. C. 266; *Drayton's App.* 61 Pa. St. 172.

³ 2 Ho. Lds. 131.

⁴ *Eaton v. Benton*, 2 Hill N. Y. 576.

by all possible means to escape from the presumption. The question has not yet been finally settled by American decisions.¹ But, *semble*, the English principles on the point are in the main observed here.²

A bequest to a creditor is presumably a satisfaction of the debt, unless the will contains a charge of debts. If the legacy is given after the charge of debts, there is no satisfaction of the debt.³ But neither a legacy not payable at testator's death, nor a gift of an annuity for life and not a gross sum, nor a gift of a residue (as that is contingent upon there being assets),⁴ will be deemed a satisfaction. If the debt be on bond or, *semble*, even if it be only a simple contract or if it be a specific chattel or a devise of land, it will not be deemed a satisfaction. A legacy given by a parent to a child is construed, with respect to the rule in question, just as if the legacy were given to a stranger.⁵ A legacy, however, by a debtor to his creditor is presumed to be a satisfaction of the debt if the legacy is equal or greater in amount than the debt. It is said that a legacy shall always be construed a satisfaction, if there is a deficiency of assets,⁶ yet, this seems to interpret a will by the event.

A legacy may be deemed a satisfaction in America of a debt due to the legatee, even where there is no deficiency of assets, though the legacy and debt differ in their natures, or the debt is certain and the legacy is uncertain.⁷

¹ See Redfield on Wills, Vol. II, 186. ² See *Errington v. Evans*, 2 Dick. 456.

³ *Chancey's Case*, 1 P. Wms. 410.

⁴ See *Clark v. Bogard*, 2 Edw. Ch. 387; *Van Reper v. Van Reper*, 1 Green's Ch. 1; *Zeigler v. Eckert*, 6 Barb. 18.

⁵ See *Williams v. Cray*, 6 Cow. 246; *Sorelle v. Sorelle*, 5 Ala. 245; *Fitch v. Peckham*, 16 Verm. 150.

⁶ *Toller*, 337.

⁷ *Williams on Ex'ors*, 1170 Am. ed.; *Dey v. Williams*, 2 Dev. & Bat. Ch. 66.

§ 6. *Satisfaction of portions by legacies.*

The courts strongly incline against double portions; therefore legacies, even less in amount than the portions, or payable at different periods, will still be deemed satisfactions *pro tanto* of portions, though not of other debts to children.¹ A legacy, however, to a child is construed as a portion, and, therefore, a subsequent advancement of the child by the testator is an ademption of the legacy either wholly or in part.² There is a distinction between this kind of ademption and of the satisfaction of debts by legacies. For although the nature of the provisions in the will may widely vary from the portion, as if the latter be put in settlement, yet the legacy will be considered to be adeemed wholly or *pro tanto*. The courts incline so strongly against double portions.³

Yet, the presumptive ademption by advancement will not exist if the legacy and advancement are not of the same nature, or if the legacy is expressly given as a compensation for a certain interest not a portion belonging to the child, or is the gift of a residue.

If the testator is not a parent or *in loco parentis* as regards the legatee, the legacy will not be considered adeemed by a subsequent advancement, unless the legacy is given for a particular purpose and the advancement is for the same end.

In America, a legacy is deemed, as in England, to be a satisfaction of a portion.⁴ The question being one of presumption, is open to parol evidence. A distributive share in the parent's estate, however, is no discharge of

¹ 2 Story Eq. Jur. 1110, 1112.

² Pym v. Lockyer, 5 M. & Cr. 29.

³ 2 Williams on Ex'ors, 1201.

⁴ Taylor v. Lanier, 3 Murph. 98.

a duty to portion,¹ though a legacy, whether greater or less in amount than the portion, is presumed to be a satisfaction *pro tanto*.

An expression of affection will not in England prevent a legacy to a wife or child from being construed as a satisfaction of any liability or portion due to the legatee.² The English rules on this head appear to be solid. The presumption is only a slight one,³ and certainly if the testator intended to do anything more than to confirm his legal liability, he would say so in terms more or less distinct. If he does use any expression of this kind, the rule will not apply. A presumption must operate on one side or the other, and in the most abstract case conceivable the identity of a gift with a debt in point of amount indicates an identity of substance, and not any accidental coincidence.

An advancement to a child, however, in America will not be deemed a satisfaction of a legacy. But if the testator was under a legal obligation to so devise, *semble*, the English rule will so far apply.⁴

The father of an illegitimate child is a stranger in law to him. But he may be *in loco parentis* if he has treated the illegitimate child as his lawful offspring. No relationship places a person *in loco parentis* unless he has voluntarily assumed such duties.⁵ If a testator, however, though a stranger, makes a gift of the thing or sum bequeathed, this is an ademption of the legacy.⁶ As to interest on portions, see *Poole v. Poole*.⁷

With respect to the presumptive ademption of a

¹ *Twisden v. Twisden*, 9 Ves. 413; see *Campbell v. Campbell*, L. Rep. 1 Eq. 383.

² *Plunkett v. Lewis*, 3 Hare, 316.

³ *Field v. Mostin*, Dick. 543.

⁴ See *Bryant v. Hunter*, 3 Wash. C. C. 48.

⁵ *Grave v. Ld. Salisbury*, 1 Br. C. C. 425.

⁶ *Clayton v. Aikin*, 38 Ga. 320.

⁷ Eng. Law Rep. Ch. App. Jan. 1872, p. 13.

legacy to a child by subsequent advancement parol evidence is only admissible respecting the subsequent act of advancement.¹ Parol evidence, however, is also admissible to show that a testator was *in loco parentis* to the legatee.²

§ 7. *Legacies to debtors.*

A bequest of a legacy by a creditor to his debtor is not a presumptive release of the debt.³ Even an express release is only a legacy, and leaves the debt still as assets, subject to the payment of testator's debts. A legacy may also be retained for a debt barred by the statute of limitations, if the statute only extinguishes the remedy. If the legacy has been given to a married woman whose husband is indebted to the testator, the executor can retain the legacy, if the wife has died without asserting her equity to a settlement, and even if she be living. But in this last case the legacy is subject to her equity.

A legacy by a creditor to his debtor is not presumed to be a release of the debt,⁴ because, as he is under no obligation, moral or legal, to give such a bequest, there is nothing *a priori* to raise such a presumption as exists in the converse case of a bequest by a debtor to his creditor.

The appointment of a debtor as executor operates as an extinguishment of the debt at law, as he could not there sue himself, but in equity he is still liable.⁵ These rules prevail in America.

The release by will of a debt is, by the New York

¹ Hall v. Hill, 1 Dr. & W. 94, 116-9.

² Powys v. Mansfield, 3 My. & Cr. 359.

³ See 2 Williams on Ex'ors, p. 1182, *et seq.*

⁴ 2 Roper, 1063.

⁵ Freakley v. Fox, 9 B. & C. 130; Finch v. Houghton, 10 Wisc, 149; Redfield on Wills, vol. II, 192.

Revised Statutes,¹ a specific legacy to the debtor, of the debt released, and, when an attesting witness is by the will discharged from a debt due to the estate, and there is legal necessity for his becoming a witness, this state of facts operates as a discharge of the legacy.²

¹ Vol. II, 84 § 14.

² Matter of Tonnele, 5 N. Y. Leg. Obs. 254.

CHAPTER XXVI.

VOID TESTAMENTARY GIFTS.

§ 1. *Uncertain gifts.*

The courts will endeavor to make sense and law of any will, however ungrammatically expressed.¹ For this purpose it may transpose sentences in point of construction, read "and" for "or," and conversely, and often disregard the use of a very plain technical phrase.²

Latterly, very few wills are held to be wholly void for uncertainty. Yet, as the law points out who are to take on intestacy, the definite rights of these parties cannot be defeated by a mere conjecture on the part of the court as to what was a testator's intention.³ On the other hand, if the will be capable, either wholly or in part, of any clear meaning, the courts will effectuate it.⁴ Many cases, accordingly, are now-a-days held to be clear which in earlier times would have been pronounced void for uncertainty.⁵ Yet, as regards precatory powers and trusts, most text writers consider that a contrary principle of construction has been

¹ 3 Keb. 49, pl. 23; *Den v. McMurtrie*, 3 Green, 276; *Lillard v. Reynolds*, 3 Ired. 366.

² See *Townsend v. Downer*, 23 Vt. 225; *Winder v. Smith*, 2 Jones Law (N. C.) 82.

³ *Kelley v. Kelley*, 25 Pa. 460; *Wooton v. Redd*, 12 Grat. (Va.) 196.

⁴ *Mason v. Robinson*, 2 Sim. & Stu. 295; *Wooton v. Redd*, 12 Grat. (Va.) 196.

⁵ 1 Jarm. 316; *Ride v. Attricke*, 1 Keb. 692, 754, 793; *Price v. Warren*, Skinn. 266.

recently adopted by the courts, *ut res magis pereat*. If, however, the subject or object is too indistinctly pointed out, the gift will of course fail.¹ An uncertainty in the subject-matter of a gift is perhaps more easily cured by parol than an uncertainty in the description of the object, owing to the comparatively limited extent of a testator's property. The gifts of "a home on the farm"² and "a reasonable support," to testator's widow, are not void for uncertainty.³

In the early case of *Bowman v. Milbanks*,⁴ the phrase, "I give all to my brother" was held to be void, as it seemed uncertain to what the word "all" referred. It is hardly necessary to say that such a devise would be, at the present day, held to be not only valid but also free from all doubt. Indeed, the very same point was so decided in *Mohren v. Mohren*.⁵ Even in the early case of *Taylor v. Webb*,⁶ the words, "I make my cousin Giles Bridges my sole heir and my executor," were held to pass the testator's realty and personalty. However, even at the present day, if the intended subject-matter is really indefinite, the gift is void for uncertainty. Accordingly, a bequest of some of my linen has been held to be void.⁷

But if the will refers to a definite portion of a larger quantity, there is no real indefiniteness in the gift. *Id certum est quod certum reddi potest*. Therefore a devise of two acres out of four that lie together is a good gift, and the devisee shall elect.⁸ So, if a testator devise

¹ See 1 Met. 444.

² Willett v. Carroll, 13 Md. 459.

³ Thompson v. Carmichael, 3 Sandf. Ch. 120.

⁴ 1 Lev. 130.

⁵ 1 Swans. 201.

⁶ Styles, 301, 307, 319.

⁷ Peck v. Halsey, 2 P. W. 387; see Rothmaler v. Myers, 4 Des. 215; Trippe v. Frazier, 4 Har. & J. 446; Flint v. Hughes, 6 Beav. 342.

⁸ Grace Marshall's Case, Dig. 281, a, n.

a messuage and ten acres surrounding it, part of a greater number of acres, the devisee has his choice of the ten acres.¹

Although the phrase "what shall remain or be left" at the decease of a prior donee is ambiguous, and is in many cases void,² yet if the phrase relate to furniture, the words will be construed to denote wear and tear of the previous specified articles, and therefore the limitation over will not be void for uncertainty. This construction will be the more readily adopted if the property has been limited to the previous taker expressly for life,³ or if the previous donee be given a power of appointment; for then the phrase will mean what shall have been unappointed.⁴ A gift to a charitable or public use, we may add, is never void for uncertainty of object. The only question in such cases usually is, whether the use is really charitable.

If part of the description of the property be erroneous, this is immaterial, and may be remedied by parol evidence.⁵ For instance, a devise of premises, stated to be in the occupancy of A., when the tenant was really B., is nevertheless valid if the property is otherwise sufficiently indicated.⁶ Even though part of the premises be occupied by A., yet the whole will pass.⁷ A reference to occupancy, on the other hand, often cures a defective statement of the location, as conversely.⁸ The gift will not be avoided by a mistake of the county

¹ *Hobson v. Blackburn*, 1 Myl. & Cr. 274.

² *Bland v. Bland*, 2 Cox, 309.

³ *Cooper v. Williams*, Prec. Ch. 61, 64; *Gibbs v. Tait*, 8 Sim. 132.

⁴ *Surman v. Surman*, 5 Madd. 123.

⁵ *Drew v. Drew*, 8 Foster (N. H.), 489.

⁶ *Blayne v. Gold*, Cro. Car. 447.

⁷ *Chamberlaine v. Turner*, Cro. Car. 129.

⁸ See *Dodson v. Green*, 4 Dev. 488.

where the premises in question are,¹ nor by a mistake of the person from whom part of the property was transmitted,² nor by calling it leasehold when it is freehold.³ It is very rarely, therefore, that a devise must fail on account of uncertainty in the description of the subject-matter of the gift.⁴

As to gifts of uncertain amount, see *Kirkman v. Lewis*.⁵

A bequest of "a handsome allowance"⁶ to executors would formerly be held void for uncertainty. Now it is valid. *Id certum est, &c.* But, a bequest of property absolutely to A., with remainder to B. of so much of the property as A. shall not spend, is void as to the remainder, for uncertainty.⁷ Yet, a gift of property so far as it shall not be appointed is valid.⁸

The following limitations of trust have been held void for uncertainty: "To some disposition thereof which my executors may consider as promising most to benefit the town and trade of Alexandria, leaving the same entirely to their disposition of it."⁹ In Virginia, however, charitable trusts must be defined with the same certainty as other trusts. The case cited, therefore, is not of universal authority.¹⁰ In Connecticut, a trust to "the most needy" of testator's brothers and

¹ *Hammond v. Ridgeley*, 5 Har. & J. 245.

² *Drew v. Drew*, 8 Foster (N. H.) 489.

³ *Doe d. Wilkins v. Kennedys*, 9 East, 366.

⁴ See *supra*, chapter 2, §§ 13, 14, *et seq.*

⁵ 17 W. R. 907; *Aston v. Wood*, L. R. 6 Eq. 419.

⁶ *Jubber v. Jubber*, 9 Sim. 503.

⁷ *Annin's Ex'ors v. Vandoren's Adm.* 1 McCarter, 135; *Condict v. King*, 2 Beasley, 375.

⁸ *Surman v. Surman*, 5 Mad. 123.

⁹ *Wheeler v. Smith*, 9 How. (U. S.) 55, 80.

¹⁰ See, however, *Harper v. Phelps*, 21 Conn. 257; *re Pennock's Estate*, 20 Penn. St. 268; *Thompson v. McKisick*, 3 Humph. 631.

sisters was executed by the court.¹ In that case it was held "that the most needy" took vested interests upon the testator's death, and that any who might have become afterwards "most needy" also were nevertheless excluded. In those States which do not require charitable trusts to be marked out by the testator with any great degree of precision, many bequests will be upheld as charitable uses which would be void in any other construction.

As to *uncertainty of object*, the following is an example: "To one of the sons of J. S." This is void, nor can parol evidence be received to show which of the sons of J. S. is referred to by the testator, because the ambiguity is patent on the face of the will.² So is a devise to twenty of one's poorest kindred,³ although this last case certainly could be fully explained by parol, and is so far unlike Strode's case that it would not be necessary to give evidence of testator's intention, but merely of facts and the circumstances of his kindred. Strode's case is plainly distinguishable from a devise to A. B., there being several A. B.'s. For this is a case of latent ambiguity, and not necessarily known to the testator. Parol evidence is always admissible to identify the A. B. intended by the testator to be the object of his bounty.

A devise to three persons, "the survivor to be each other's heir," was so construed as to make the two survivors joint tenants.⁴ The old case of *Wood v. Ingersoll*,⁵ which leans the other way, is at present hardly of any authority. A devise to persons constituting a cer-

¹ Bull v. Bull, 8 Conn. 47.

² Strode v. Lady Faulkland, 3 Ch. Rep. 183; see McDermot v. United Ins. Co. 3 Serg. & R. 607.

³ Webb's Case, 1 Roll. Ab. 609 (D) 1.

⁴ Hambledon v. Hambledon, 1 Leon, 262.

⁵ 1 Bulst. 61

tain voluntary association is not void for uncertainty, but the members will take in their individual and not their associate character.¹

If the name or description of a legatee is erroneous, parol evidence can be given of the person really meant.² Therefore, under a bequest to John and Benedict, sons of John Sweet, a son named James, there being no John, was held entitled.³ *A fortiori*, a person may take under a name by repute.⁴ So, if the name is right, but other parts of the description are wrong, the defect can be cured by parol.⁵ The question whether an uncertainty of the description of the subject or object of a gift by will can be cured or not by parol resolves itself into the *ulterior* inquiry, is the ambiguity so patent as that the testator shows he was aware of it, and that he was leaving a part of his will undeclared in writing? As this is very rarely the case, it follows that at the present day hardly any case of uncertain or erroneous description in a will can occur which may not be remedied by parol.

§ 2. *Rule against perpetuities.*

The rule against perpetuities is founded on principles of public policy, and is not a peculiar law of tenure. This rule against perpetuities is equally applicable to personalty or realty, and to deeds as well as wills. The produce of property or trusts for accumulation are also governed by the same rules, except so far as is otherwise regulated by statute. The common law is said to

¹ Bartlett v. King, 12 Mass. 537.

² Smith v. Smith, 4 Paige, 271; Trustees v. Peaslee, 15 N. H. 317; Woods v. Moore, 4 Sandf. S. C. 537.

³ Dowsett v. Sweet, Amb. 175.

⁴ Neuthway v. Ham, Tamlyn, 316.

⁵ Standen v. Standen, 2 Ves. Jr. 589.

“abhor” a perpetuity. This aversion long ago assumed form and shape in a rule to the effect that no future interest in property could be inalienable or indestructible for a longer period than a life or lives in being and twenty-one years and nine months afterwards. This period has been adopted by analogy to the usual settlement of property on the marriage of the owner. The period of twenty-one years is independent of the fact of there being an actual minority of a remainderman; but the additional term of nine months is only allowed in case of actual gestation.¹ For the purposes of the rule, a child *en ventre sa mere* is considered as a life in being.²

Limitations after a failure of issue should be carefully made to depend on a failure of the issue that take an entail; otherwise, the remainder will be void for remoteness. If a term is antecedent to the entail, and the trusts are in any way dependent on a total failure of the issue, such trusts are void. For, as the term precedes the entail, it cannot be barred by the tenant in tail. It does not, therefore, come within the rule which prevents limitations after an estate tail from being too remote. If the remainders are common law limitations, they cannot be too remote as remainders. But no particular estate can be made to commence one hour later than twenty-one years, or after a life or lives and twenty-one years, reckoned from the testator's decease. Though the testator declines to insert lives, yet he is still limited to twenty-one years.

At common law, no question of remoteness could really arise as to land, as such property could only be settled by way of particular vested estate and contingent remainder, and the estates of the latter denomina-

¹ Cadell v. Palmer, 7 Bligh, N. S. 202.

² 1 Jarm., 223.

tion were in the power of the preceding owner of the vested interest. But settlements of personalty might be open to the objection of remoteness, if, indeed, in the early ages of the common law any settlement of personalty would be valid. Uses and devises, too, being indestructible before the statute of uses was passed, might be too remote and trusts are now in the same condition.

In *Cole v. Sewell*,¹ Lord St. Leonards denied that remainders could be too remote. But in *Wood v. Griffin*,² Bellows, J., argues, very ably for the applicability of remoteness to remainders, on the ground that otherwise an infinite series of life estates might be created to unborn children. A *cy pres* construction was not adopted in the case referred to, on the ground that the plain intention of the testator was to give the propositus only an estate for life. The rule in *Shelley's case* was abrogated in New Hampshire, by statute, in 1834.³ This, perhaps, confused the consideration of the question in the case last cited. In States, therefore, where the rule in *Shelley's case* still prevails, the state of facts referred to by Judge Bellows cannot exist, as the *cy pres* doctrine will be applied, and an estate tail be thus given to the ancestor of the unborn tenants for life. However, so long as the estates of the unborn contingent remainder-men are destructible, they cannot, in point of principle, be too remote, although they are void as possibilities upon possibilities. Such limitations, indeed, it must be admitted, have been held to be void for remoteness, also, in numberless cases.

The real Property Commissioners, Fearne, Preston,

¹ 2 Conn. & Laws, 344; cited in 2 Jarman on Wills, 728.

² 46 N. Hamp. (Hadley) 230.

³ *Crockett v. Robinson*, 46 N. Hamp. (Hadley) 454.

and Jarman, have thought that remainders could be too remote. Lewis on Perpetuity also adopts this view and supports it, like Judge Bellows, by reference to the fact that an estate for life could not, at common law, be given to the unborn son of an unborn son. Yet, it seems clear that, in point of principle, though not of authority, a common law remainder can never be too remote, for the same reason that a remainder after an entail cannot be void for remoteness. The accessory follows the principle. If the preceding tenant can defeat the remainder, it is but an accessory to his interest, and cannot be open to a distinct charge of remoteness.

No difficulty of this sort can arise as regards vested interests. The question, therefore, is only applicable to the class of remainders termed contingent. These, however, are in the power of the particular tenant, and as they can be defeated by the merger, surrender or forfeiture of his vested interest, they are equally within the limited area of legal perpetuity. If the estate of A. is vested, and as such cannot be void for remoteness, and if A. can defeat the contingent estate of B., the latter estate is equally free, as A.'s own interest is, from any imputation of being too remote. The opinion of Mr. Lewis,¹ therefore, that remainders or common law estates could be void for remoteness, although undoubtedly supported by the old authorities, seems to be wrong in principle.

The author referred to considers that as trustees to preserve contingent remainders will be prevented by Chancery from destroying the remainders, these may be too remote. But as the trustees must have the legal estate for the purpose specified, the remainders referred to are trusts, which every one admits may be void for

¹ Lewis on Perpetuity ; see Sugden on Powers, Intro. p. 1.

remoteness and indestructibility. No life estate could be limited to an unborn trustee that would not be as destructible as the contingent remainder he was intended to protect. A fee to an existing trustee will, indeed, render the trusts indestructible, but then the trusts are not legal uses or remainders. Recent authority is against the position of Mr. Lewis, but the older reports are unanimously in his favor.

The application of the *cy pres* doctrine to an indefinite series of life estates is certainly *authority* for holding that these may be too remote, else why should they be reconstructed or remoulded, and why are such remainders, except the first limitation to the unborn issue, held, when in a deed, to be too remote? But, though ancient authority is on the side of such a view, it seems to be demonstratively certain that remainders, properly so called, cannot by possibility come within the reason of the rule against perpetuities.¹ Neither can a limitation after an estate tail be too remote, because the tenant in tail can bar it. If the tenant in tail dies soon after his birth, the land, still, will not be kept out of the market, but will pass to the next vested remainder-man, if the contingent remainder is not vested before that time.

Powers of sale and exchange are, for similar reasons, not open to the charge of remoteness, even when no definite period is prescribed within which the powers must be exercised. The rule against perpetuities is founded on the principle that a perpetuity keeps land out of the market. A power to *sell*, however, is an authority to bring land into the market, and, consequently, if the donee of the power be an ascertained person, and can sell at any time he pleases, the power cannot pos-

¹ See *Cole v. Sewell*, 2 Conn. & Laws. 344.

sibly be open to the objection of remoteness. A tenant in tail taking subject to such a power cannot bar it, but neither can he bar an annuity or rent to which he is subject. Are, then, rents and annuities issuing out of estates tail void for remoteness? The tenant in tail cannot sell, but the donee of the power is not thus fettered. The objection of perpetuity, therefore, applies, if at all, to the settlement of the land, not to the donee of the power. But the objection does not apply to the successive tenants of settled land, because they are virtually only tenants in tail of such lands, as the donees of the power may elect.

Jarman¹ considers that remainders may be too remote, though destructible, inasmuch as their destruction is a tortious act which cannot be presumed. This argument, however, is equally applicable to the judicial fiction of recoveries. Why should the tenants in tail barring of his issue and remaindermen be presumed? Conversely, a feoffment originally was a judicial proceeding made before the assembled freeholders, in whose presence public livery was given. It did not necessarily operate by wrong. Why then should there be any presumption against such a mode of conveyance being used, even though some of its indirect consequences would be to extinguish contingent remainders.

As a limitation that may be too remote is void from the outset, the infirmity of the construction not being curable by the result, so it may be said that a limitation to an unborn son of an unborn son is void for remoteness, inasmuch as the particular tenant may possibly never destroy this contingent remainder. But the two cases of remoteness mentioned are only seemingly analogous. They are not really apposite or correlative. In

¹ Vol. I, 226.

the former case, the limitation is *necessarily* remote in a certain event. In the latter case, the limitation is not *necessarily* remote in any event. No subsequent accident can make it too remote, while at any moment of time there is a person *in esse* who holds the contingent remainder in his hand. Remainders, therefore, never can be too remote or keep any land out of the market.

A devise to a class is void, even as to those members that are alive, if *any* of the donees may not come into existence within the allotted period of a life or lives in being and twenty-one years, or may not be *in esse* at the death of the testator, and the vesting of whose shares is postponed beyond majority.¹ If the limitation is so framed as, by possibility, to let in objects beyond the line of perpetuity, the gift is wholly void. No event ever controls construction, unless the testator expressly so desire,² and it is doubtful whether even his wish can avail against a rule of law, as distinguished from a rule of construction.

Jarman, however, admits that an interest void as executory may be good as a remainder. This is perhaps one reason of the rule that any interest that can be construed a contingent remainder will never be regarded as an executory devise. The case put by him, however, is hardly in point. It is that of a devise to A. for life, remainder in fee to the children of A. who shall attain twenty-two. If this is construed as a gift to a class, its validity is open to doubt, and, if not so construed, it does not exemplify the position which it is adduced by Jarman to support.³

A testator will rarely violate the rule against perpetuities in providing for his children or grandchildren,

¹ *Newman v. Newman*, 8 Jur. N. S. 354; 1 Jarm. 229, *et seq.*; *Leake v. Robinson*, 2 Mer. 363.

² *Lord Deerhurst v. Duke of St. Albans*, 5 Madd. 232. ³ 2 Mer. 363.

as all these latter must be born during the lives of his children. It is when conferring gifts on the issue of others that he should be on his guard not to exceed the allotted period of suspending the vesting of any interest. Of course, an unborn person may take only a life estate or a term of years. The question of perpetuity relates not to what he takes, but when he takes it.

Jarman¹ considers that not only may a limited interest be given to an unborn person, but a good remainder may be limited after it, if given to competent persons. But this position seems to be true only if the remainder be vested. As regards law, no such limitation is good as a remainder, if the particular tenant is not *in esse* at the time of the testator's decease. As an executory interest, then, the vesting is not necessarily confined to the period of a life or lives in being, and twenty-one years after. The child may not die under age. What ground, then, is there to allege that the vesting may not be suspended beyond the legal period? By reason of such possibility it is void. There is reason, doubtless, to contend that, as contingent interests of every kind are now transferable, there is no such thing as a contingent executory interest where the person who is to take the interest is ascertained, though not the event upon which his interest is to vest. But this is not the ground Jarman takes on this point. Indeed, if a limitation is void for remoteness, all ulterior limitations not of a substitutional nature are necessarily void also.²

If a gift is limited on the happening of either of two events, one of which is too remote, and the other is not, the gift is valid and will vest in case the legal contin-

¹ Vol. II, 242. See *Cooke v. Bowler*, 2 Keen. 54.

² *Proctor v. Bishop of Bath & Wells*, 2 Black. 358.

gency is fulfilled.¹ But, if the two events cannot separately occur, the whole limitation is probably void. The law on this head is not yet clearly settled.² But, except where the contingencies are alternative or substitutional, and are thus separable, the question of remoteness is determined by what is possible, and not by what actually occurs.³

A power that may be void as to some members of a class is void *in toto*. But appointments may be made under general powers to persons who could not take under the primary deed. For a general power is equivalent to the fee for all purposes of sale; and the rule against perpetuities only applies where there is an impediment to a sale. The rule last stated, therefore, does not apply to special powers. Appointees under such must be persons who could take immediate gifts under the deed creating the special power.⁴

The rule against perpetuities, therefore, cannot be evaded by directing trustees to settle the trust property in any way not permitted to the settlor himself. Appointments, however, that exceed the limits of perpetuity are valid *pro tanto*, so far as they are confined within the limit, even though the appointments be made to all the beneficiaries as a class.⁵

An indefinite power of sale is calculated to bring property into the market rather than to keep it out of it.⁶ It is strange, therefore, that its validity should ever have been questioned on the ground of perpetuity. Jarman, however,⁷ seems to consider that such powers

¹ Fowler v. Defau, 20 Barb. 224.

² Cambridge v. Rous, 8 Ves. 12.

³ Moore v. Moore, 6 Jones Eq. 132; Loring v. Blake, 98 Mass. 258.

⁴ Bristowe v. Ward, 2 Ves. Jun. 336.

⁵ Duke of Marlborough v. Earl of Godolphin, 1 Eden. 404.

⁶ Boyce v. Hanning, Cromp. & Jer. 334; Biddle v. Perkins, 4 Sim. 135.

⁷ Vol. I, 251. This question has been discussed by the author in a review of Sugden on Powers, in Law Magazine and Review, London, May, 1862.

may in some respects be deemed weak. But the validity of those powers is now established in England by several adjudications.¹

The rule against perpetuities applies to the vesting, not the possession of estates. Sometimes it is difficult to determine whether the period in question relates to the vesting of an interest or to its being divested in favor of an ulterior donee. If the period is too remote, then, in the first case, the interest never vests. But if the period relate to the divesting of the interest, and is too remote, then the first limitation becomes absolute and indefeasible. The case is analogous to that of a condition precedent, as distinguished from a condition subsequent.

Although the course of events will not control the construction, yet the courts will seek, if possible, to effectuate the testator's intention. The decisions have even gone so far as that, where an absolute bequest has been given to unborn persons on whom afterwards a strict settlement was made by codicil, the judges have rejected the codicil, which was void as giving estates by purchase to the children of persons unborn, and have set up the original will.²

If the void limitations are contained in the same document, yet they will often be deemed expunged or executed only *cy pres*. For instance, if a life estate be given to the unborn child of A. for life, remainder to his unborn grandson, the courts will give an entail to A.'s unborn son.³ The case of *Pitt v. Jackson*, indeed, involved a violent application of *cy pres* construction. Still it will probably be followed in future. In an ordinary case of perpetuity, the *cy pres* rule will be readily used by the courts.

¹ *Wallis v. Freestone*, 10 S. 225; *Davies v. Davies*, 1 Ad. & Ell. N. S. 330.

² *Arnold v. Congreve*, 1 Russ. & My. 269. ³ *Pitt v. Jackson*, 2 Br. C. C. 51.

Upon a devise to the male heirs of M. upon terms, for compliance with which one year after majority was allowed, it was held¹ that as M. might die leaving a son as yet unborn, who would be entitled to take within twelve months after he obtained majority, the contingency on which the estate depended might not happen within a life or lives in being, or within twenty-one years and nine months after the death of M. Unless, therefore, the devise should be construed so that the estate should vest on the death of M., the limitation depended upon an event which was too remote, and the remainder was void.

In *Maxwell v. Means*,² a testator devised his estate to his four brothers and sisters, and to their children, "but, if they should all die without leaving any issue of the body of either them alive at the time of the death of the survivor of them, or if such issue should die before attaining the age of twenty-one years, then" his desire was, &c. It was held that the term issue comprehended the more remote descendants, as well as the children of the devisees, and consequently that the remainder over was too remote, being limited to take effect on a contingency which might not happen during a life in being and twenty-one years afterwards.

A legacy given to A., and if he dies without leaving lawful issue then to B. is too remote as to B. For the rule under the Revised Statutes of New York,³ in cases of this sort, see *Norris v. Boyes*.⁴ The rule in *Pater-son v. Ellis* applies, even though the limitation over is to the testator's children in such terms that their heirs might take. But, if the devise over is to the survivors,

¹ *Taylor v. Mason*, 9 Wheat. 325.

² 2 Brock. Marsh 1.

³ *Patterson v. Ellis*, 11 Wend. 259.

⁴ 13 N. Y. (3 Kern.) 273.

it may mean children living at the death of the party, and not a general failure of issue.¹

By the New York Revised Statutes,² all provisions relating to future estates are extended to chattels real. The absolute ownership of personal property is not to be suspended for a longer period than the duration of two lives in being at the death of the testator,³ or during the minority of a previous donee in fee. In all other respects, future limitations of personalty are assimilated in meaning to like limitations of land.⁴

In *Bean v. Hockman*,⁵ a direction to divide rents amongst testator's children, and the issue of such as might be dead was held void, as not being confined to lives in being. In the same State, in which future estates must vest within the duration of two lives, trusts or limitations beyond that period, if separable from those within the perpetuity line, will be enforced.⁶

In Michigan a perpetuity is not allowed, nor is the *cy pres* doctrine readily applied in such cases.⁷ In that State, however, it was held that a bequest of money generally, and not upon permanent uses, to an unincorporated society, is valid. In other words, indefiniteness of object is not readily construed as a perpetuity, in that State, to avoid a gift.

A limitation will often be interpreted in a secondary sense, if this will prevent an illegal suspension of interest or other invalidity.⁸ For a similar purpose of effectuating a testator's wishes, if illegal gifts, trusts or powers can be separated from legal ones, they will be

¹ *Moffat v. Strong*, 10 Johns. 12.

² Vol. I, 724, § 23; 773, §§1, 2.

³ *Thompson v. Livingston*, 4 Sandf. (N. Y.) 539.

⁴ *Hannan v. Osborn*, 4 Paige, 336; *Gott v. Cook*, 7 Paige, 521.

⁵ 31 Barb. 78; *Stephens v. Evans*, 30 Ind. 39; New York, 1 Rev. Stat. 723, § 15; *Id.* 773 § 1; *Schettler v. Smith*, 41 N. Y. 328; *Manice v. Manice*, 1 Lans. N. Y. 348.

⁶ *Port v. Hover*, 33 N. Y. 593. *

⁷ *St. Armour v. Rivard*, 2 Mich. 294. ⁸ *Butler v. Butler*, 3 Barb. C

valid *pro tanto*.¹ But, if this separation cannot be made without defeating the general intention of the testator, all the trusts will be invalid.² If illegal contingencies can be separated from legal ones, a like rule prevails; therefore a remainder limited on a contingency which is void for remoteness may still be good on another alternative contingency not thus void.³

§ 3. *Accumulation.*

Where no statute is in question, income can be accumulated⁴ for the same period that a trust of the land itself may be deferred from vesting in interest. By the 39 & 40 G. 3, c. 98, trusts for accumulation of income must be confined in England to the period of the life of the grantor, *or* the term of twenty-one years from his death, or during the minorities of persons living at the time of death of the grantor, or during the minorities of his beneficiaries who would be allowed to take under the common rule against perpetuity. In case the trust exceeds this term, it is void *in toto*, and not merely for the illegal excess.⁵

The third section of the act excepts from its purview accumulations to pay debts or portions, or consisting of the produce of timber or wood. The testator must elect as to which of these periods he will adopt.

"Or" will not be read "and" in this statute.⁶ At least such is the opinion of Lord Eldon, in *Griffiths v. Vere*. Jarman also⁷ inclines to this opinion.

¹ *Haxtun v. Corse*, 2 Barb. Ch. 506; *Irving v. De Kay*, 9 Paige, 521; *Awdry v. Lord*, 9 N. Y. (5 Seld.) 403.

² *King v. Rundell*, 15 Barb. 139.

³ *Fowler v. Depau*, 20 Barb. 224; *Killam v. Allen*, 52 Barb. 605; *Everitt v. Everitt*, 29 Barb. 112.

⁴ *Hawley v. James*, 5 Paige, 322.

⁵ See, however, *Langdon v. Simson*, 12 Ves. 295.

⁶ *Griffiths v. Vere*, 1 Ves. 136.

⁷ Vol. I, 267.

It is doubtful, however, whether "or" must not be read "and," in order to give effect to every clause in the act. By construing the statute literally, one of its clauses is silenced, since the term of twenty-one years necessarily comprises the minority of any infant living at the time of the testator's death. All know "the probable intention" of the legislature, but the courts can know it only from the written terms of the act.

Decisions under this act throw light on the construction of those statutes which with us have altered the common law rules against perpetuity. In *Haley v. Bannister*,¹ the testator directed an accumulation of dividends on stock until the youngest of the children of his daughter, born or to be born, should attain majority, when the whole was to be transferred to such child, and his brothers and sisters. The will contained a residuary clause. Sir J. Leach, V. C., said: "The statute prevents an accumulation of interest during the minority of an unborn child; but as to the principal, the law remains as before the statute. The excess of accumulation prohibited by the statute would form part of the residue." Jarman doubts the validity of this case, but the decision is clearly founded on the act, which however would admit of the accumulation in question if the parent of the children took any interest under the will within the meaning of the third section.

If there be a limitation of the *corpus* of the property, after a period too remote for accumulation, the ulterior limitation is still valid if within the common line of perpetuity. The statute applies only to income or produce, and not to the property that yields the revenue.

A direction to accumulate all the testator's estate for fifteen years by investment and reinvestment in bonds is, of course, valid.² If the direction for accumu-

¹ 4 Madd. 275.

² *Rhoads v. Rhoads*, 43 Ill. 239.

lation is given to those in possession, and relates merely to the mode of enjoyment, it causes no suspension and is so far inoperative.¹ If there is an absolute gift, followed by a direction to accumulate for more than twenty-one years, the income after the twenty-one years passes under the previous gift, and is not undisposed of.² Where the trust for accumulation is grafted upon an estate where vesting is deferred until after the time for accumulating, any statutory restraint upon the period for accumulating will not accelerate the vesting of the estate, and the income meantime goes to the heir, next of kin, or residuary beneficiary.³

Where a residue is directed to be accumulated, the income, when its accumulation becomes illegal, will go to the heir or next of kin, according as the property is real or personal.⁴ A provision in a will for the payment of premiums upon insurance of the lives of beneficiaries is not open to the charge of remoteness, if confined within the limits of the rule regulating the period during which property may be accumulated.⁵

Trusts for accumulation are in New York prohibited, except for infants. But where an annuity is given absolutely to a person *non compos mentis*, a court of equity may direct any surplus not required for his maintenance to be invested for his use, even though he be not an infant.⁶ If there be a direction in the will to accumulate the estate of such a beneficiary beyond the legal period, the next of kin will be entitled to the accumulations.⁷ Accumulation for the benefit of infants *in esse* at the time when such accumulations are directed to begin is

¹ Clulow's Trust, 5 Jur. N. S. 1002.

² Combe v. Hughes, 11 Jur. N. S. 194 Rolls; s. c. Id. Ch. App. 380.

³ 1 Jarm. 292; Jones v. Maggs, 9 Hare, 605.

⁴ Hull v. Hull, 24 N. Y. Ch. App. 647.

⁵ Bassil v. Lister, 9 Hare, 177.

⁶ Craig v. Craig, 3 Barb. Ch. 76; Fosdick v. Fosdick, 6 Allen, 41.

⁷ Id.

valid under the New York statute;¹ *aliter*, if the children are not *in esse*, and the right to the accumulated fund is contingent.

Where a bequest is given with a void trust for accumulation, the bequest itself may nevertheless be valid, and the trust alone be void. But if the legatee was not intended to take for his own benefit, but to be a mere trustee, there is a resulting trust to the heir or next of kin, and the trustee does not profit by reason of the invalidity of the trust. In Pennsylvania it has been held that a devise of land for the accumulation of the income beyond the term allowed is absolutely void.²

§ 4. *Restraints upon alienation.*

A restraint against alienation may be imposed on a tenant for life or years.³ The condition is good in a lease only on account of the privity between the landlord and tenant and the provision for *cesser* implied in the condition.⁴ Therefore, any property given to a person (except a trust for the separate use of a married woman) for life can no more be protected from alienation than if it were a gift in fee; but it can be made determinable on alienation or bankruptcy by a collateral limitation or a proviso for *cesser*.⁵ The cases in the United States, indeed, are contradictory on this head.⁶

In point of principle, any restriction against alienation beyond a life or lives in being is void. But such restrictions have acquired a prescriptive validity in leases of more than twenty-one years duration. Except, however, in leases alone a general restriction against

¹ *Haxton v. Corse*, 2 Barb. Ch. 506.

² *Hildyard v. Miller*, 10 Penn St. 326.

³ *Rochford v. Hackman*, 9 Hare, 475.

⁴ *Rochford v. Hackman*, 9 Hare, 480.

⁵ See 11 Jarm. & Byth. by Sweet, 486.

⁶ See notes to *Dumpor's case*, *Smith's Lead. Cas.* by Hare & Wallace, Am. ed.

alienation during a period extending beyond the line of perpetuity seems to be in principle necessarily void.

In Pennsylvania, no restriction on alienation can be imposed on an assignment or devise in fee.¹ A like rule prevails in Maryland.² But in New Hampshire and several other States such a restraint is valid if confined within the line of perpetuity.³ The restriction, however, on a grantee or devisee in fee can only be imposed by a condition.

The common law theory of the relations of conditions to the reversion is laid down in *De Peyster v. Michael*,⁴ where it is said that the right of a grantor to clog the grant with a condition in restraint of alienation depends on the question whether he retains any interest in the thing granted. This is the converse of the common law doctrine that a stranger could not take advantage of a condition. But the condition has been in some cases held not to be void, even when not attached to a reversion, if the condition is confined within the line of perpetuity.⁵ However, it seems that the value of a condition against alienation depends on the person who is to take advantage of the condition having a reversion. If he has not such an interest, the condition appears to be void as regards authority, even though the restriction is intended to operate within the line of perpetuity. Even if the condition is not against total alienation, but is merely against assignment without consent, the objection seems to apply, as land may be thus kept out of the market, especially as a condition would doubtless be held not assignable in the American courts more than in England. Unless the condition against alienation is held assignable the property cannot be conveyed without the consent of two. This

¹ *Walker v. Vincent*, 7 Harris, 369.

² *Smith v. Clark*, 10 Md, 168.

³ *Barker v. Cobb*, 36 N. H. 345.

⁴ 2 Sel. 467.

⁵ *Barker v. Cobb*, 36 N. H. 345.

is not a lawful condition except in the case of husband and wife, for joint tenants can each assign his own share. The question is whether any land is kept out of the market. It is only the fee that can be suspended. The present interest of an adult male cannot be rendered inalienable except in a few States.

In *McWilliams v. Nisby*,¹ it was held that a provision or condition against assignment might be reserved on an alienation in fee, if the restraint was confined within the line of perpetuity. A rent may doubtless be reserved on an alienation in fee, because such a reservation does not tie up the land at all, while itself is alienable. But, as a condition on an assignment in fee cannot be itself assigned, but only released to the lessee or assignee, it seems to be equivalent to a condition in general restraint of trade in land, and, as such, to be void in principle.

The reason, probably, why such conditions were held valid originally in leases was that as the termor was the mere bailiff of the landlord, and as the latter could alien the rent, there was virtually no restraint on the alienation of any valuable interest. There seems not to be any reason for impugning a condition against assigning a life estate more than one for years. The condition, too, does not apply to bankruptcy, or alienations to creditors *in invitum* by process of law.

In *Fisher v. Taylor*,² money was devised to executors for the purchase of land, "in trust for S., the said S. to have the rents, but the same not to be liable to any debts of S." The court held that the creditors could not attach the life interest of S. This decision is not approved of,³ and is opposed to *Hammersley v. Smith*.⁴ At the same time, it seems to be quite clear that the

¹ 2 Serg. & R. 507; see *Jackson v. Schurz*, 7 Johns. 227; see *Simonds v. Simonds*, 3 Met. 562.

² 2 Rawle, 33.

³ See *Smith's Lead. Cas. by Wharton*, 68.

⁴ 4 Wharton, 128.

trust in question will be upheld in many of the United States.

§ 5. *Mortmain.*

A gift, whether a charitable one or not, to a corporation, can never be void for uncertainty of object, or as creating a perpetuity, unless a local law otherwise provides. However, the statute of 34 Hen. VIII, c. 5 (the first Wills Act) excepts corporations, from those who are qualified to take land by will. A similar law prevails in New York, and some States, while in Massachusetts, Indiana, Pennsylvania, and certain other States there is no mortmain code whatever. If the trust of a devise in mortmain is divisible, the part of it which is not for the benefit of the corporation is so far valid. But, if the trust is indivisible, the whole devise is void,¹ except in those States that place no restrictions on devises to corporations, or, as it is termed, in mortmain. The etymology of the term is most probably due to the fact that corporations formerly consisted of religious persons exclusively, and that these were deemed to be *dead* in law. License from the crown now enables corporations in England to take land by will.² Previous to that act, the royal license was of avail only when there was no intermediate manorial lord. There are few such persons now, owing to the long operation of the act *Quia emptores*, 13 Ed. I, which forbids the creation of any new manor, though old ones are gradually becoming extinguished.

The statute 43 Eliz. c. 4, amended the St. 34 Hen. VIII, c. 5, by allowing devises to corporations, if they were established for charitable uses. The 9 Geo. II, c.

¹ See *Andrew v. New York Bible & Prayer Book Soc.* 4 Sandf. Sup. Ct. 156.

² 7 & 8 Will. III, c. 37.

36, however, repealed this provision of the statute of Elizabeth as to wills of land, with the exception of certain favored institutions designated in the act. This statute, commonly called the Mortmain Act, (inasmuch as devises to charitable uses are generally made to corporations), has been adopted in Massachusetts, North Carolina, Kentucky, Indiana, Pennsylvania, and it would seem in several other States, and probably has not been abrogated in any,¹ except Virginia and Maryland. Several special statutes, however, both in England and several of the United States, enable certain corporations to take land by will.

The 43 Eliz. has not been re-enacted either in New York, New Jersey, Pennsylvania, or Maryland. But it is now certain that chancery has a common law jurisdiction to enforce charitable trusts. There is, consequently, no doubt that equity can execute such trusts, no matter whether the statute of Elizabeth has been adopted in the State or not, unless so far as statute law expressly forbids.

The statute 9 Geo. II, c. 36, avoided all devises of land to charitable uses.² As most charitable institutions are incorporated, the act of Geo. II thus came to be called the Mortmain Act, though its object is to restrict charitable, not corporate, uses of land.

The mortmain statutes have not been re-enacted, in their full spirit generally through the States. The mortmain code of those States that have legislated on the matter merely requires that the testamentary act should be performed at some certain period before death, and does not draw any distinction between real and personal property. In New York, an illegal devise to a corporation in trust is void even as to the trust.

¹ 2 Kent, 5th ed. 285 ; 4 Ib. 507, 508.

² Mellick v. The Asylum, Jacobs, 180.

The property descends to the heir as on an intestacy *pro tanto*.¹ But, before it was prohibited by 2 Rev. Stat. 67, § 3, a devise of land in trust to sell, and pay therefrom a legacy to a corporation not authorized by its charter to take by devise, was valid, as the Statute of Wills was an enabling statute, and the exception of corporations was deemed not to be a prohibition.² An unincorporated society may take by bequest in New York.³ In *Beekman v. People*,⁴ a will directing the establishment of a dispensary was held invalid because it involved a conversion into land for a site, and the bequest of the remaining surplus was also held to be equally void.

A gift which would be void if directly made to a corporation, cannot, it would seem, be upheld, if made in trust for it, although the high authority of Kent⁵ is to the contrary. The converse position, that an illegal devise to a corporation for a trust in itself valid is legal, was decided in *Ayres v. Meth. Ch.*⁶ For equity never wants a trustee, and if the limitation to the trustee is void on any ground, the court will appoint new trustees, where the trust itself is unexceptionable.

There is then, it seems, hardly sufficient foundation for the statement in Kent's Commentary,⁷ that though corporations were excepted from the statute of wills, yet a devise in trust for a corporation would be valid in those cases where the statute 43 of Eliz. c. 4, is

¹ *McCartee v. Orphan Asylum Society*, 9 Cow. 437; *Ayres v. Method. Epis. Church*, 3 Sandf. 351.

² *Theolog. Seminary v. Childs*, 41 Paige, 419; *Wright v. Method. Epis. Church*, Hoffm. 202.

³ 6 Paige, 639; Hoffm. 202; 3 Edw. 79.

⁴ 27 Barb. 260; compare *Burrill v. Sheill*, 2 Id. 457.

⁵ 4 Comm. 508.

⁶ 3 Sand. N. Y. 351.

⁷ Vol. IV, 508.

inapplicable.¹ It seems, also, clear that ~~a~~ devise in trust for a corporation would be within the equity of the exception of the statute of wills. Although equity has a common law jurisdiction to execute charitable uses, yet it must take care to follow the law, whether common or statutory, and not to contravene the plain intent of an enactment.²

In *Dashwell v. Attorney-General*,³ and *Wilderman v. Baltimore*,⁴ the objects were too indefinite, or rather uncertain. But, at all events, *semble*, a charitable devise to an unincorporated society will be executed in most of the States, if the objects, though indefinite, yet belong to an ascertainable class.⁵ In short, charitable uses are, at common law, free from all objection, on the ground of uncertainty of object or remoteness. The question in most cases, therefore, is not whether the State has adopted the 43d Eliz., but whether it has by a positive statute abrogated the common law jurisdiction of chancery to execute charitable uses.

By the New York Revised Statutes, a corporation cannot take land by will unless it is expressly authorized to do so. Yet a devise, in New York, to an individual for charitable uses, is doubtless valid, especially if the uses are not a perpetuity; in other words, if the gift is to be at once distributed. But otherwise unincorporated societies cannot be deemed authorized to take property forbidden to a corporation. For, equity will, by reason of its common law jurisdiction, execute such trusts, if this can be done without any construction *cy*

¹ See Flood's case, Hob. 136.

² See Comstock's note to 4 Kent, 506; *Owens v. The Missionary Society*, 14 N. Y. 380; *Marshall v. Downing*, 23 N. Y. 366.

³ 5 Har. & Johns. 392.

⁴ 8 Md. 551.

⁵ *Bartlett v. Nye*, 4 Met. 378; *Griffin v. Graham*, 1 Hawks, N. C. 96; see Kent, vol. IV, 508.

pres, the objects being sufficiently defined.¹ By an act passed in New York, in 1860, ch. 360, no person having a husband, wife, child, or parent, can devise or bequeath to any charitable or literary corporation more than half of his or her estate.

A devise in charity to a corporation that can take by will is valid, although it has been often laid down that a corporation cannot stand seized to a use. It was held at an early date, in England, that a devise to a corporation, though void under the statute of wills, was good if given for charitable uses. It seems, indeed, that a corporation cannot stand seized to a use different from its own, and therefore the question of devises to charitable uses is only connected with devises to corporations so far that if the association can take land by devise the gift cannot be void for uncertainty, and the corporation takes the legal estate. As charities were executed by chancery at common law, it seems equally clear that a testamentary gift to trustees for charitable purposes is valid.² In several of the States, however, where it was thought the equitable jurisdiction in respect to charities rested on 43 Eliz., and where this statute was abrogated, it has been held that charitable devises to unincorporated associations are void for uncertainty.³

Canal shares are within 9 Geo. II, c. 36, but shares in companies that trade in land are personalty,⁴ for such land is itself personalty as regards the partners. The land, indeed, must be used for the business of the company, and not held in trust for the individual share-

¹ 4 Kent, 508.

² *Orphan Asylum v. McCarter*, 9 Cow. 437.

³ *Dashwell v. Attorney-General*, 5 Har. & Johns. 392 (Md.) ; *Gallego v. Attorney-General*, 3 Leigh, 450 (Va.) ; *Wheeler v. Smith*, 9 How. U. S. 55 ; 14 N. H. 315 ; 14 N. Y. (4 Kern.) 380.

⁴ *Morris v. Glynn*, 27 Beav. 218.

holders.¹ Railway debentures not being assignments of the undertaking, are not within the statute.²

If land is vested in trustees for the individual members of a company that trades in land, in proportion to the shares of the members, and not for the purposes of the company, such a devise is an interest in land within the mortmain acts.³ A devise of land to a corporation in another State than that where it has its charter, and is prohibited from holding land, is valid.⁴ This decision seems sound in principle, since land is peculiarly amenable to the *lex loci*, and the reason of the mortmain acts does not seem to apply to a State which disregards such restrictions.

The act of 9 Geo. II, c. 36, prohibits all devises of land to charitable uses, but does not apply to bequests of pure personalty. If the gift be partly charged on land, it will only be void *pro tanto*.⁵ A condition *subsequent*, to convey to a charity, is nugatory, and the devisee holds for his own use.⁶ But, it is doubtful whether the devisee would not, at the present day, be deemed to be a trustee for the testator's heir.⁷ Requests to devisees to purchase land are, of course, equivalent to trusts for that purpose, according to the usual rules for construing precatory requests.⁸ But if the trustees have an option to lay out the money given them on land, or on personal estate, the statute will not avoid the gift.⁹

¹ Hayter v. Tucker, 4 Kay & J. 251.

² Bunting v. Marriott, 19 Beav. 163.

³ Hayter v. Tucker, 4 Kay & J. 251.

⁴ Am. Bible Soc. v. Marshall, 15 Ohio, 537.

⁵ Waite v. Webb, 6 Madd. 71.

⁶ Poor v. Miall, 6 Madd. 32.

⁷ See Stubbs v. Sargon, 2 Keen, 253.

⁸ See 2 Story Eq. Jur. § 1068-1074; Hart v. Hart, 2 Desaus, 83; Van Dyck v. Van Beuren, 1 Caines, 84; Farwell v. Jacob, 4 Mass. 634; Bolling v. Bolling, 5 Mumf. 334.

⁹ Soresby v. Hollins, Amb. 211; Curtis v. Hutton, 14 Ves. 537.

So, where the direction will be satisfied by hiring premises, the bequest will be good.¹ Yet, a gift on condition that the charity get a certain grant of land as a gift from others is void on principle, as it tends to throw more land into mortmain.² But if it has not this effect, as, for instance, if it is to improve buildings already owned by a charity, the gift is good.³

Uses are not deemed executed in America, if the purpose of the devise requires that the devisee for uses should have the legal estate.⁴ In that case the devise was in fee to seven persons, by name and unincorporated, for the benefit of a Freemasons' Lodge. The devise was held valid, yet, it seems in point of principle to be void, on the grounds of uncertainty and remoteness, as it is not really a charitable use.

Unless the bequest is expressly of pure personalty,⁵ marshalling is not allowed in favor of charities. It is submitted that this rule has been strained too far, since a legacy not confined exclusively to personalty may be defeated if the general residue consists of only realty. If a gift consisting of realty and personalty, is made partly for charitable and partly for other uses, the charity, indeed, has no equity to improve the illegal intention of the testator. But, where he has not been guilty of any confusion of legal rights or boundaries, it is unreasonable to exclude a fair charitable bequest from the ordinary principles of marshalling. That doctrine applies to all interests primarily. If it has not been extended to certain partially void dispositions, this has been owing to the contemplated evasion of the law

¹ *Johnson v. Swan*, 8 Madd. 457.

² *Attorney-General v. Davies*, 9 Ves. 533.

³ *Harris v. Barnes*, Amb. 651.

⁴ *Van der Volgen v. Yates*, 3 Barb. Ch. 242.

⁵ *Attorney-General v. Lord Montmorris*, 1 Dick. 379.

by the testator. To exclude charities as such, and *eo nomine*, from all benefit of marshalling, has no foundation in any principle known to equity.¹ In these cases the debts and legacies were paid rateably out of the realty and personalty, and were not wholly thrown on the personalty.

A charity charged on realty as an auxiliary fund for the personalty, will be valid as far as the latter fund reaches.² The act 9 Geo. II, however, it is to be remembered, is construed strictly against charities, which are, under its provisions, even less favored than aliens, for these can get money arising from the sale of land, and can have assets marshalled for them. See *Robinson v. London Hospital*,³ as to the manner of apportioning a mixed residue between charitable and other uses.

Where lands have been long enjoyed by a charity, under a void will, it will be presumed that they had originally some other title also to the land.⁴

The court first considers the intention of the testator, as declared by the primary meaning of the terms used by him. If this intention violates the mortmain law, the court will hold the will to be so far void, and will not seek to effectuate it by giving the terms used a secondary sense.⁵

§ 6. *Various void gifts.*

The proceeds of realty impressed with a trust for conversion may be given to an alien,⁶ so may legacies raised out of land.⁷ A title to land already acquired

¹ See *Wilson v. Thomas*, 3 My. & Ke. 579; *Howse v. Chapman*, 4 Ves. 542.

² 1 Jarm. 210.

³ 10 Hare, 19.

⁴ *Attorney-General v. Moore*, 20 Beav. 119.

⁵ *Tatham v. Drummond*, 10 Jur. N. S. 1087.

⁶ *Fondrin v. Gowdey*, 3 My. & K. 383.

⁷ *Id.*

by purchase, but not by descent, is confirmed by naturalization,¹ unless the alien have conveyed it to a third party, in which case his conveyance is void by the law of England, though probably such conveyance would be deemed valid in America.

A will which contained a gift to one of the attesting witnesses was void under the statute of frauds which required that a will of land should be attested by three credible witnesses. But the statute 25 Geo. II, c. 6, avoids the gift only, unless it be to a creditor, and confirms the rest of the will. This statute is in force in several of the States.² It applies only to direct and immediate gifts, not to consequential ones, such as the curtesy of a fee given in the will to the witness's wife.³ The statute also does not apply to personalty nor to limitations to bare trustees or executors.

The laws of the different States vary on this point. The 1 Vict. c. 26, extends the disability of an attesting witness to the husband or wife of such witness and applies to wills of personalty as well as of realty. The act also allows an attesting witness to be executor, since such is, by 1 W. IV, c. 40, a trustee of any undisposed-of residue for the next of kin. The executor is in all the States a trustee for the next of kin.⁴

A devise to the testator's heir is inoperative unless the quantity or quality of the gift is different from what the inheritance would be.⁵ A different rule prevails in England. A limitation to the heir of the testator now gives him there an estate by purchase to some extent.

¹ *People v. Conklin*, 2 Hill, 67.

² *Taylor v. Taylor*, 1 Richardson, 531.

³ *Hatfield v. Thorp*, 5 B. & Ald. 589.

⁴ *Wilson v. Wilson*, 3 Binn. 567.

⁵ *Parsons v. Winslow*, 6 Mass. 178.

§ 7. *Charitable uses.*

As gifts to a corporation are never void for uncertainty or remoteness, so a like rule applies to charitable uses. Lord Hardwicke, in *Jones v. Williams*,¹ defines a charitable use as "a gift to a general public use which extends to the poor as well as the rich." A charitable use may perhaps be defined as an appropriation of property for purposes of public benefit. The education of the sons of gentlemen is a charitable use.² The doctrine of charitable uses does not rest wholly on the statute of 43 Eliz. c. 4, but is founded on the common law.³ The proper tribunal for administering charitable uses, where there is no trustee appointed by the grantor, is the common law side of the Court of Chancery.

The people of America possess all the common law prerogatives of the sovereign of England; and the common law jurisdiction of the chancellor, as the deputy of the sovereign under the sign manual, vests in the courts of each State.⁴ The American courts, therefore, can execute charitable uses, if they are not superstitious, no matter whether the statute of Elizabeth is in force in the State or not, because charitable trusts were executed by the chancellor at common law prior to the statute.⁵ Neither the common law, however, nor the statute, as regards charities, is considered to prevail in Maryland or Virginia.⁶

Restrictions against perpetuities do not apply to charitable uses.⁷ Therefore, objections on the ground of remoteness and uncertainty are often obviated by

¹ Amb. 651.

² See *Price v. Maxwell*, 28 Penn. 23.

³ See *Burbank v. Whitney*, 24 Pick. 146.

⁴ *Griffin v. Graham*, 1 Hawks. 96.

⁵ *Beall v. Fox*, 4 Ga. 404.

⁶ See, however, *Beatty v. Kinty*, 2 Pet. (S. C.) 566.

⁷ *Shotwell v. Mott*, 2 Sandf. Ch. 46.

construing a trust a charitable one. If such a construction can be adopted, the gift will be free from the taint of uncertainty or perpetuity.

Under the statute 43 Elizabeth, c. 4, notwithstanding the mortmain acts, a testamentary appointment is good to a corporation for charitable uses. So is a devise by a tenant in tail.¹ Devises to charitable uses are valid in America,² except that in Pennsylvania the will must have been made a month before the testator's decease.³

The statute 43 Eliz. c. 4, is in force in North Carolina and Kentucky, but the uses must be specified, as the courts in these States will not execute charitable uses *cy pres*.⁴ The statute also prevails in Massachusetts and Pennsylvania. Perhaps the reason why the American courts will not execute these uses *cy pres* is the opinion (now exploded), that chancery had no common law jurisdiction in such matters.

The statute was not re-enacted in any of the States. It is not in force in Maryland. It was repealed in Virginia and New York. As to the original jurisdiction of chancery in cases of charitable uses, independently of statutes, see *Vidal v. Mayor of Philadelphia*.⁵

The statute 43 Eliz. c. 4, contains a copious enumeration of charitable uses. But any public benefit—irrespective of sects—is a good charitable use.⁶

A charity to found a school for gentlemen's sons⁷

¹ Flood's case, Hob. 136.

² *Gass v. Wilhite*, 2 Dana, 170, 175.

³ See *Price v. Maxwell*, 28 Penn. St. 23.

⁴ *McAuley v. Wilson*, 1 Dev. (N. C.) Ch. 276.

⁵ 2 How. U. S. 128.

⁶ *Franklin v. Armfield*, 2 Sneed (Tenn.), 305; *Cresson's Appeal*, 30 Penn. St. 437; *The American Asylum v. The Phoenix Bank*, 4 Conn. 172; *Price v. Maxwell*, 28 Penn. St. 35; *Gerard Will Case*, *Id.* 54; *Coggelstall v. Pelton*, 7 Johns. Ch. 292.

⁷ *Atty.-G. v. Earl of Lonsdale*, 1 Sim. 109.

would in America probably be deemed a public free school, *cy pres*.¹

A gift to Shakers or even Odd Fellows is not, yet a gift to Freemasons² is, a charitable use. These societies, therefore, whether incorporated or not, can take such a gift. A like rule applies to religious and educational bodies. Gifts to such societies are charitable uses.³ In Delaware, a gift of money arising from land to the trustees of a church, for the education of its poor, is void.⁴ In Virginia, where the statute of Elizabeth is not in force, a direction that executors should distribute \$2,000 among needy and respectable widows, and pay \$1,000 towards the support of a Roman Catholic chapel in a certain place, was held to be too vague.⁵ A like decision was arrived at where the bequest was "to the Baptist Association that for ordinary purposes meets at Philadelphia annually, to be a perpetual fund for the education of youths of the Baptist denomination," &c. The association was not incorporated.⁶

In Connecticut, a devise of a farm to the yearly meeting of people called Quakers, in aid of the charitable fund of the boarding school established by the Friends of Providence, was held to be void.⁷

For the construction of charitable uses in Louisiana and Maryland, see *McDonough v. Murdock*;⁸ in Pennsylvania, see *Vidal v. Gerard*.⁹ As recent researches in England have led to the discovery that the Court of

¹ See *American Asylum v. Phoenix Bank*, 4 Conn. 172.

² *Duke v. Fuller*, 9 N. H. 536.

³ *Evangelical Assn. App.* 35 Penn. St. 316.

⁴ *State v. Wiltbank*, 2 Harrington, 18; *State v. Walter*, 2 Harrington, 151.

⁵ *Galleo v. Atty.-General*, 3 Leigh, 450.

⁶ *Baptist Association v. Hart*, 4 Wheat. 1; 3 Pet. 481.

⁷ *Greene v. Davis*, 6 Conn. 293; see *Wilderman v. Baltimore*, 8 Md. 551.

⁸ 15 How. 367.

⁹ 2 How. 127.

Chancery has a common law jurisdiction in respect to charitable uses, it is probable that the decisions which have been pronounced in some of the States here, invalidating such uses, on the ground that the statute of Elizabeth was not in force in the State in question, are no longer of any great authority.

A residuary gift to a charity may carry money directed to be laid out in buying land which the owner refused to sell.¹ The heir takes land illegally devised to corporations, but subject to any legal trust imposed thereon, where the will speaks from its date, even if there is a residuary devisee. No restriction exists in England or in the American States upon bequests of personalty to corporations.

If the testator directs a legacy for a charitable use to be paid out of pure personalty, and this is exhausted by creditors, the assets will be marshalled for the charity, but not otherwise.² The court regards even bequests to aliens with greater favor, as these may hold the proceeds of land devised to be sold for their benefit. The principle of the laws against aliens holding land is to prevent foreigners from getting thereby the franchise. But, the principle of the mortmain laws, and of the acts against superstitious uses, is to prevent a disinherison of the heir; but this would be effected by a devise ordering a sale.³

The principle of the mortmain acts is most sound, and should be extended to bequests as well as devises. This will, doubtless, be soon done in England, as legislators now are not wholly drawn there from the landed aristocracy, as was the case when the act of George II was passed. It seems most improper to encourage a

¹ 12 Eng. Jur. Rep. 1848, p. 197.

² Attorney-Gen. v. Lord Mountmorris, 1 Dick. 379.

³ See 2 Redfield on Wills, 513.

weak-minded testator to give at his death what he would not himself part with during his life. He should not thus be allowed to cheat the reasonable expectations of his relatives. "Charity begins at home." But testators might, indeed, be allowed to devote to charitable uses, or rather to a love of notoriety, one-half of their real and personal means at death, or the whole during their lives, if they please. In New York, however, real estate cannot be devoted to charitable uses.

The act 43 Elizabeth¹ contains an exception as to Scotland, and does not operate in Ireland. The cases under it, however, are important in many respects even there, since the Court of Chancery has a common law jurisdiction in respect to charities in all countries subject to the common law.

Bequests or gifts of personalty to charitable uses are very favorably construed, and will be executed as nearly as possible in conformity with the main intentions of the testator, even if his special object be unattainable.² Therefore, a gift to such charitable uses as A. shall appoint will be executed by the court, in default of appointment by A. So, if the testator refers to indefinite objects, or to ones which fail.³ A charitable trust, therefore, as such, is never void for uncertainty, and if there are two or more charities answering the description, the fund will be divided amongst them.⁴ In some of the States, however, charitable uses will not be executed *cy pres*. Consequently, if the first object

¹ Chap. 4.

² 1 Jarm. 216; see Boyle on the Law of Charities, b. 2, c. 3, p. 147, *et seq.*; Gilman v. Hamilton, 16 Illinois, 225; The Domestic and Foreign Missionary Society's Appeal, 30 Penn. St. 425, 434.

³ Moggridge v. Shackwell, 1 Ves. Jun. 464; Mills v. Farmer, 1 Mer. 55.

⁴ Waller v. Childs, Amb. 524.

fails, there is a resulting trust to the testator's representatives. Under the New York statute¹ limiting bequests to charitable societies to one-half of the testator's estate, a bequest in excess of the authorized amount is still valid *pro tanto*, and there is an intestacy as to the remainder.²

Even in England, a bequest to pay off a mortgage debt on a meeting-house has been held invalid.³ This case, however, is obviously, in principle, inconsistent with that of *Harris v. Barnes*.⁴

A legacy is void if founded or conditioned upon an illegal grant or act, or if derived from the residue of an illegal appropriation.⁵ The accessory follows the principal. Therefore, a gift to the occupiers of certain alms-houses intended to be established by the testator contrary to law, is as void as the gift of the houses.⁶ On the other hand, the primary gift may be good, and the secondary one alone be invalid.⁷

Although charitable uses are never void for uncertainty or perpetuity in England, and never for perpetuity, and but very rarely for uncertainty, in America,⁸ they may, of course, be void for uncertainty if they are not *exclusively* charitable trusts, but are mixed up with other uses in such a way as to be undistinguishable therefrom, and the trustees die without exercising their discretion. The want of trustees to execute charities is no ground for weakening the uses, except in those States which hold that the equitable

¹ N. Y. Laws, 1860, ch. 360.

² *Leary's Estate*, 1 Tuck. (N. Y. Surr.) 233.

³ *Corbyn v. French*, 4 Ves. 418.

⁴ Amb. 651.

⁵ *Att'y-Gen. v. Davies*, 9 Ves. 535.

⁶ *Att'y-Gen. v. Goulding*, 2 Bro. C. C. 428.

⁷ *Blandford v. Thackerell*, 4 Bro. C. C. 394.

⁸ *Williams v. Williams*, 4 Seld. 525; 2, Story Eq. Jur. § 1158.

jurisdiction is entirely founded on the statute of Elizabeth.¹

Although no provision regarding *contracts*, in the United States constitution or elsewhere, seems applicable to gratuitous gifts to corporations, yet, in the case of *Dartmouth College v. Woodward*,² the contrary was held to be the law as regards the special provisions in the United States constitution respecting contracts.

A use, though void originally, becomes valid by lapse of time and user. A presumption arises from long user that the invalidity was authorized by special statute, even though there be no record of such enactment. This presumption, however, can only exist where the invalidity springs from the common law, and not from an express, old, but not obsolete, statute.³ Length of time, however, is no bar to a charitable use, unless the funds are meantime applied to another charitable purpose, and not to the benefit of private individuals.

A gift for such objects of benevolence and charity as the legatee may select is too indefinite to be executed by the court.⁴ Such descriptions of gift are considered to be not merely charitable uses, since they could be applied by the donee to other purposes.⁵ Even "private" charity is not a public charitable use.⁶ However, at the present day, it is probable that all such dispositions would be regarded as within

¹ See *Owens v. Missionary Soc. of M. E. Church*, 4 Kern. 380; *Bartlett v. Nye*, 4 Met. 378.

² 4 Wheaton, 518.

³ See *Shelford's Real Prop. Acts*, tit. Prescription.

⁴ *Morice v. Bishop of Durham*, 9 Ves. 408; 10 Ves. 532.

⁵ *Doe d. Toone v. Copestake*, 6 East, 328; *Vezey v. Jamson*, 1 Sim. & Stu. 69.

⁶ *Ommaney v. Butcher*, Turn. & R. 260.

the meaning of the statute of Elizabeth, or else would be executed at common law. Yet, a bequest for the erection of monuments to the memory of a large class of persons was held, in *Gilmer v. Gilmer*,¹ to be void on account of the alleged impossibility of carrying out such a direction.

A legacy, however, to the poor of a parish is a good charitable use for those of the parish not receiving alms. *Seemle* the *criteria* of a charitable use are that it is benevolent, public, and not of a private nature.² Therefore, if trustees have an option to apply or not the whole of the fund to charitable purposes, it is not the case of a charitable use.³

If the object of a charitable use becomes extinct in the testator's lifetime, the interest will go to the next of kin.⁴ The statute of Elizabeth was construed liberally in respect to charities by the ecclesiastical tribunals.⁵ The mortmain act left the courts, however, no loophole for liberality or evasion.

The question whether a bequest is for a charitable use or not is important in some States in respect to procedure. Besides, though the gift violate no rule of law, yet, if the intended beneficiaries are indefinite, the bequest will be void, except as a charitable use. Where a gift is for a public purpose that is not equivalent to "a charitable use," and is void as indefinite, it then lapses for the benefit of the testator's representatives.⁶

If the sum to be applied to charitable uses cannot

¹ 42 Ala. 9.

² *Attorney-General v. Clarke*, Amb. 422.

³ *Kendall v. Granger*, 5 Beav. 300.

⁴ *Langford v. Gowlard*, 9 Jur. N. S. 12.

⁵ See *Redfield on Wills*, Vol. II, 506.

⁶ 2 Story Eq. Jur. § 1156; *Trustees Baptist Association v. Hart*, 4 Wheat. 1, 33, 39, 43-45; *Owens v. The Missionary Society of the M. E. Church*, 4 Kern. (N. Y.) 380; *Price v. Maxwell*, 28 Penn. St 23.

be ascertained, owing to the failure of other trusts, which were first to be discharged out of the common fund, equity will not execute the charitable use.¹ But preceding definite trusts will not be suffered to absorb the whole fund.²

A gift of a surplus after a void bequest to a charitable use was held void in *Beekman v. People*.³ This case, indeed, is hardly so far consistent with the equitable rule which executes valid trusts, if separable from invalid ones. Here the sum necessary for the void purpose could be easily computed, and the remainder could be then given to the objects of the testator's bounty. The American courts, certainly, seem, on the whole, not to construe charitable uses as favorably as the English courts.⁴

If the testator leaves a blank for the charitable uses, the English court will execute the gift *cy pres*, but not if the sum is not mentioned.⁵ If the testator had evidently one sole and peculiar charitable object in view, the court will not apply its *cy pres* doctrine, but will hold that a lapse or failure of the particular object has taken place.⁶ A *cy pres* construction, however, is rarely adopted in America in respect to charities.⁷

A *cy pres* execution of charitable trusts will not be granted in New York;⁸ nor in North Carolina;⁹ nor in Alabama.¹⁰

¹ 1 Jarm. 196.

² *Adnam v. Cole*, 6 Beav. 353.

³ 27 Barb. 260.

⁴ *Phelps, Exor. p. Phelps*, 28 Barb. 121.

⁵ *Hartshorne v. Nicholson*, 26 Beav. 58.

⁶ *Russell v. Kellett*, 3 Sm. & Gif. 264.

⁷ See *Baptist Association v. Hart*, 4 Wheat. 1; s. c. 3 Peters. 484; *Going v. Emery*, 16 Pick. 107; *Winslow v. Cummings*, 3 Cúsh. 358; 2 Story Eq. Jur. § 1162; 4th Kent. 5 ed. 508, note.

⁸ *Andrew v. New York Bible and Prayer Book Society*, 4 Sandf. Sup. Ct. 156.

⁹ *McAuley v. Wilson*, 1 Bat. & Dev. Eq. 276; *Holland v. Peck*, 2 Ired. Eq. 255.

¹⁰ *Carter v. Balfour*, 19 Alabama, 814.

At all events, a *cy pres* application of charitable gifts does not prevail to the same extent in America as in England. But there is a resulting trust to the heir or next of kin of the testator on failure of his primary scheme.¹ However, it seems an exaggeration to hold that a *cy pres* application is never resorted to here.² In some of the States, indeed, which profess to execute charitable uses, such gifts of a very ordinary kind have been held void for uncertainty, as if any gift to a charitable use could be definite as to its objects.³ But, the American courts will apply *cy pres* rules in effectuating the especial design of the testator, though not in diverting his charity to other objects than those specified in the will.⁴

§ 8. *Religious uses.*

Bequests for superstitious uses generally are void at common law and in America,⁵ and if there is no general purpose of a legal nature indicated, the bequest will not be executed *cy pres*, even in England. In America, *cy pres* execution is not attempted in any case as regards a diversion of the fund in question to other uses than those specified in the will.⁶ By force of 23 Hen. VII, c. 10, and 1 Edw. VI, c. 14, lands devised for certain superstitious uses were forfeited to the crown. The uses referred to in these statutes were the praying for deceased persons, the maintenance of perpetual obits, lamps, &c.⁷ Judge Redfield⁸ considers that other superstitious uses than those specified in the statutes

¹ *McAuley v. Wilson*, 1 Dev. Eq. 276.

² *Gass v. Wilhite*, 2 Dana, 170.

³ *White v. Fisk*, 22 Conn. 31.

⁴ *Gilman v. Hamilton*, 16 Ill. 225.

⁵ 2 Redfield on Wills, 495.

⁶ See *Gass v. Wilhite*, 2 Dana, 170.

⁷ *Porter's case*, 1 Co. 22.

⁸ Vol. II, 495.

were not thereby invalidated,¹ but that they are void on grounds of public policy, both in England and America. They were not void at common law, however, if in accordance with the doctrines of the Roman Catholic Church, and, therefore, such uses now can only be deemed invalid as coming within the English statutes against superstitious uses. These do not apply to charitable uses. Superstitious devises lapse to the crown in England. If the gift be really superstitious, but not within the letter of those statutes, the devise or bequest is still void, but the heir or representatives (and not the crown), take the gift.² A gift to a dissenting chapel is not superstitious.³ A bequest to enable Jews to observe their rites is valid,⁴ but to propagate their doctrines is illegal.⁵ These cases, however, are mutually contradictory.

A devise, in America, for the maintenance of a Catholic priest, if construed to be in ease of the congregation, will be valid.⁶ A devise for the promotion of Christianity is valid in Massachusetts.⁷ A bequest for a like purpose in trust for the American Board of Commissioners for foreign Missions is also valid.⁸ Numerous bequests to Bible societies have been held to be valid throughout the Union, and in Vermont a religious bequest will be upheld, even though the donees are not incorporated and the gifts are indefinite.⁹ In Pennsyl-

¹ See *Cary v. Abbot*, 7 Ves. 490, 495.

² See *Shelford Ch. Uses*, 89.

³ *Att'y-Gen. v. Pearson*, 3 Mer. 353; *West v. Shuttleworth*, 2 My. & K. 684.

⁴ *Straus v. Goldsmid*, 8 Sim. 614.

⁵ *De Costa v. De Pas*, Amb. 228.

⁶ *McGinn v. Aaron*, 1 Penn. 49; see *Brewers v. Forman*, Addis, 362; *Trustees of Bishops' Fund v. Eagle Bank*, 7 Conn. 476.

⁷ *Going v. Emery*, 16 Pick. 107; see *Winslow v. Cummings*, 3 Cush. 358; *Brown v. Kelsey*, 2 Cush. 243; *Wells v. Doane*, 3 Gray, 201.

⁸ *Bartlett v. King*, 12 Mass. 537.

⁹ *Burr v. Smith*, 7 Vt. 241; *Button v. Am. Tract Soc.* 23 Vt. 336.

vania, a devise to a school in which only sectarian doctrines are inculcated is valid,¹ and a devise in the same State, for religious purposes, to an association not incorporated at the time of testator's death, but since incorporated, is valid.²

In *Cary v. Abbot*,³ it was held that a bequest for educating and bringing up poor children in the Roman Catholic faith was void. Judge Redfield⁴ considers that such a bequest would be valid in America, if there was no local statute to the contrary.⁵ The Judge, too, thinks that such a trust as that in *Cary v. Abbot* would be now executed *cy pres* in England, in favor of some other charitable object. But it is doubtful whether chancery ever executes an illegal trust *cy pres*, though it will so carry out a special or an indefinite trust of a charitable nature. The authorities that appear to incline to the contrary doctrine had special circumstances which seemed to involve a *cy pres* execution of the trusts, or else were not superstitious within the meaning of the statutes.⁶

A devise to the trustees of Brookhaven, a corporate body capable of holding land, in trust to pay the rents and profits to the minister or other ruling officer of a Baptist church which had no incorporation, was held void at law in *Jackson v. Hammond*.⁷ But a bequest to an unincorporated female society in another State, for charitable uses, is valid.⁸ In South Carolina, a testator gave to an unincorporated "Methodist Church at A., and the preachers of said church, and the Pedee Mis-

¹ *Price v. Maxwell*, 28 Penn. St. 23.

² *Zimmerman v. Andrews*, 6 Watts & S. 218.

³ 7 Ves. 490, 495; but see 2 & 3 W. 4, c. 115, § 1.

⁴ Vol. II, 495.

⁵ *Philadelphia v. Elliott*, 3 Rawle, 170; *Babb v. Reed*, 5 Rawle, 151.

⁶ 2 Story Eq. Jur. § 1168; *Moggridge v. Thackwell*, 7 Ves. 36; *Mills v. Farmer*, 1 Mer. 55, 100.

⁷ 2 Caines's Cas. Err. 357.

⁸ *Washburn v. Sewall*, 9 Met. 280; *Bartlett v. Nye*, 4 Ib. 378.

sion, \$8,000, to be put at interest forever, and the interest to be distributed by said trustees according to the several necessities of said church, preachers and mission." The bequest was held valid.¹ In Kentucky, owing to its constitution, no religious or other use is void as superstitious.²

Catholics are now, in England, on the same legal footing as dissenters, by 2 and 3 W. IV, c. 115, § 1. A bequest for the propagation of Catholic doctrine is, therefore, now valid in that country.³ But Jarman thinks⁴ a gift for masses for the repose of a soul would be void.⁵ The distinction cited is as refined as that drawn between the two Jewish cases cited by Jarman.⁶ But it is law.

Bequests to Baptists, Jews, Unitarians, Irvingites and other dissenters are valid, even in England. The 2 and 3 Will. IV, c., 115, legalizes bequests for masses for deceased persons in Ireland,⁷ but not in England.⁸

Bequests for uses against the spirit of the constitution are invalid.⁹ As to superstitious uses in America, see, further, *Gass v. Wilhite*.¹⁰

In the case of *Vander Volgen v. Yates*,¹¹ it was held that a conveyance of land to trustees in trust for the members of a Freemasons' lodge, vested the legal title in the trustees, in trust for the members of the lodge, and that on failure of heirs of the trustees, the court would still execute the trust. It was also held

¹ *Gibson v. McCall*, 1 Rich. 174; see *Witman v. Lex*, 17 Serg. & R. 88.

² *Gass v. Wilhite*, 2 Dana, 170.

³ *Bradshaw v. Tasker*, 2 My. & Keen. 221.

⁴ Vol. I, 191.

⁵ See *West v. Shuttleworth*, 2 My. & Kee. 684.

⁶ *De Costa v. De Pas*, Ambl. 228; and *Straus v. Goldsmid*, 8 Sim. 614.

⁷ *Read v. Hodgins*, 7 Ir. Eq. 17.

⁸ *West v. Shuttleworth*, 2 M. & K. 684; *Blundell, in re*, 30 Beav. 360.

⁹ *Themmines v. De Bouneval*, 5 Russ. 288.

¹⁰ 2 Dana, 170.

¹¹ 3 Barb. 242.

that the statute of uses executed only those uses that entailed no special confidence in the trustees.

Judge Redfield observes very justly that, owing to the American constitution, the doctrine of superstitious uses should be very strictly construed. Indeed, there is every reason for holding that, by the constitution, all the English statutes relating to religion are abrogated here, and each case is made to rest on its own moral merits, or, rather, on its not being absolutely inconsistent with social order. Its opposition to the creed of the majority is unimportant, since there is no established church in any of the States.

§ 9. *Immoral gifts.*

Few bequests are found void for immorality. Scarcely any one is found so depraved as, in his will, to blaspheme the name or violate the law of God. Some, indeed, have "cursed God and died" immediately afterwards. But even the few whose names thus figure on the roll of folly were in the paroxysm of the last agony, when their minds doubtless were unsettled at the near prospect of eternity. Few, if any, of the descendants of Adam are so foolhardy as to draw up deliberately a will in which, for purposes of immorality, they dispose of property to objects not authorized by law.

Where a testator gave a fund to his daughter M., for life, and after her decease to all her children begotten or to be begotten, only the illegitimate children born before the testator's death took any interest.¹ Illegitimate children will not take as "children," even where there is a statute enabling them to inherit.² The decision referred to appears to be sound, inasmuch as a

¹ Law Rep. 7 Eq. 170.

² Thompson v. Macdonald, 2 Dev. & Bat. Eq. 463; see Shearman v. Angel, Bail. Eq. 351.

law of inheritance does not apply to wills. After-born children of a deceased wife's sister cannot take in England under the will of their mother, no matter how accurately they may be described in it.¹ The law of Louisiana will not uphold any provision for illegitimate children, except it be confined to maintenance.²

A bequest in violation of neutral or belligerent rights, or of any other rule of international law, is void.³

§ 10. *Relations of certain primary, to ulterior, gifts.*

Where an executory gift is in defeasance of a prior gift, and the latter fails from the outset, or by lapse, the ulterior interest, nevertheless, will take effect.⁴ So, a limitation over, in the event of the first donee having only one child, operates though he has no child.⁵ Likewise, if the prior donee disclaims or neglects to perform some prescribed act, the ulterior gift, nevertheless, takes effect.⁶

But, if the event which defeats the first estate and confers the second is capable of happening in the testator's lifetime, and if the events which happen would give an absolute interest to the first devisee if he survived the testator, the lapse of his interest affects the ulterior gift also.⁷ In other words, lapse never aids an ulterior gift contingent upon other events than lapse. The rule in *Calthorpe v. Gough* applies where the first gift is to a class. But if the members are not to be ascertained until the decease of the testator, there can be no lapse, but only the non-fulfilment of a contingency.⁸

¹ *Howarth v. Mills*, 12 Jur. N. S. 794; s. c. Law Rep. 2 Eq. 389.

² *Bennett v. Cave*, 18 La. Ann. 590.

³ *Haberston v. Vardon*, 7 Eng. L. & Eq. 228.

⁴ *Andrews v. Fullham*, 2 Stra. 1892.

⁵ *Murray v. Jones*, 3 Ves. & B. 313.

⁶ *Avelyn v. Ward*, 1 Ves. Sen. 420.

⁷ *Calthorpe v. Gough*, Cit. 3 B. C. C. 395.

⁸ See 2 Jarm. 709.

As to the rule itself, it seems very rational. It would be a very technical construction which would give to a donee a benefit in the very event in which the testator intended he should not take. As regards the ulterior devise, the lapsed gift is an absolute one, so far as that it cannot be expunged from the will, but, though ineffectual itself, in the event, yet it properly operates by construction to defeat the ulterior gift. In all cases, the valid parts of a will, if separable from the void parts, will be upheld.¹

As to the converse case of a lapse of the ulterior gift, it operates for the benefit of the heir or residuary devisee, according to the local law of the State.² But, if the executory devise fails not by lapse, but by the non-occurrence of the contingency on which it was limited, the first devisee receives the benefit of this failure of the executory devise. The failure is one of fact, so to speak, not of law, or lapse, as in the case first put. This distinction is supported by authority.³

§ 11. *Lapse.*

Lapse is the failure of a testamentary gift by reason of the donee predeceasing the testator. A lapse is not precluded by giving the donee an absolute interest in personalty or a fee in realty. The representative of the donee, in case of a lapse, takes no interest. Even a bequest to A. and his executors or administrators will in England give the latter nothing, even though A. be dead,⁴ and the limitation to the executor seems to imply

¹ *Post v. Hover*, 30 Barb. 312; 17 N. Y. 561; 22 Wend. 483; 24 *Id.* 641; 7 Paige, 521; *Bean v. Hockman*, 31 Barb. 78; *Hull v. Hull*, 24 N. Y. 647.

² See *supra*, p. 346.

³ *Jackson v. Noble*, 2 Keen, 590; see 2 Jarm. 711; *Tarback v. Tarback*, cited 2 Jarm. 375.

⁴ *Maybank v. Brooks*, 1 Bro. C. C. 84.

that the testator was providing for the contingency of a lapse, since otherwise the use of the additional words would be unnecessary. However, even though the testator expressly negative the legal event of a lapse, it will nevertheless occur, unless there is a limitation expressly over to a third party or to the executors of the donee. These last two rules would doubtless be ignored in most, if not all, of the United States. The doctrines in question are wholly irrational. It is strange that while the courts studiously endeavor, as a rule, to prevent a testamentary gift from failing, they, on this particular question of lapse, act contrary to their general beneficent tendencies.

In *Wisner v. Barnet*,¹ a testator bequeathed a certain fund to his executrix, to be paid to three persons whom he should thereafter name. He died without naming any. It was held that there was an intestacy as to the fund, which went accordingly to the persons entitled under the statute of distribution.

Where donees take as joint tenants, no lapse can occur, unless the whole class becomes extinct during the life of the testator;² *aliter*, if they take as tenants in common.³ The legal presumption is that donees take as joint tenants. But, this presumption is easily negatived in a will. The clause "equally to be divided," for instance, in such an instrument operates to create a tenancy in common, though at common law it has not this effect. The feudal doctrines were adapted to prevent the inefficacy or contingency of a gift. Hence arose the *rule in Shelley's case*, and the presumption in favor of joint tenancy—doctrines which chancery follows only when the context contains nothing to guide its choice.

¹ 4 W. C. C. 631.

² *Buffar v. Bradford*, 2 Atk. 220.

³ *Page v. Page*, 2 P. W. 489.

If the gift is to *a class*, even as tenants in common, yet, if the members of the class are not to be reckoned until a future date, those dying before that period take no interest, and occasion no lapse.¹ But if they are severally named,² the case will be different.³ If the future event happens in the testator's lifetime, any of the tenants in common, members of the class, dying after the contingent event, and before the testator's death, suffer a lapse of their shares,⁴ though Jarman⁵ questions the soundness of this rule.

Lapse may befall the equitable or the legal interest only.⁶ The question, therefore, was never open to the vexed dispute concerning the *scintilla juris*; all testamentary gifts, being so far equitable in their nature as, in the primary instance, not to depend upon any doctrine of tenure. In conveyancing *inter vivos*, however, although there never was any ground for questioning the validity of any use which would have been good as a remainder in a direct conveyance, without the intervention of trustees, yet it certainly required a statutory exposition or enactment to hold that the common law line of trustees might become extinct without affecting the rise of the future uses for which the trustees were appointed.

Charges on the interest given a beneficiary do not become extinguished on the lapse of his interest.⁷ The case is analogous to the lapse of the legal estate only, which does not affect the equitable limitation.

¹ Jarm. Vol. I, 295; Doe *z.* Stewart *v.* Sheffield, 13 East, 526; Anderson *v.* Parsons, 4 Greenl. 486.

² Knight *v.* Gould, 2 My. & K. 295.

³ Barber *v.* Barber, 3 My. & Cr. 688.

⁴ Allen *v.* Callow, 2 Ves. 289.

⁵ Vol. II, 297.

⁶ Doe *z.* Shelley *v.* Edlin, 4 Ad. & Ell. 582.

⁷ Croft *v.* Slee, 4 Ves. 60.

But charges on a devise when lapsed usually inure to the benefit of the devisee. The difficulty in some cases is to determine whether the heir should not be entitled to the charge as the produce of undisposed-of realty; in other words, whether the charge is an exception from the gift, in which case its lapse would inure for the benefit of the heir. This usually happens in the case of void charges.¹ A legacy charged on real estate fails for the benefit of the heir or devisee, if the legatee die before the time of payment, and the postponement of payment was not through a desire on the part of the testator, as indicated in the will, of accommodating the heir or devisee.²

The opinion of that most philosophic judge, Lord Eldon,³ inclines in favor of the heir, except where there is an intention totally to disinherit him. This doctrine seems sound. For, equity, though it does not regard rules of tenure favorably, yet, it favors the heir, and gives him, and not a residuary legatee, the produce of a void charge,⁴ except where statute law provides to the contrary.⁵ As the residuary devisee, however, seems to have a stronger claim than a particular devisee to the benefit of a lapsed charge, the doctrine in *Cruise v. Barley*,⁶ appears to apply *a fortiori* to lapsed charges on particular gifts, and to divert them from the particular devisee to the heir.

The provisions of 1 Vict. c. 26, § 25, and of similar statutes in the United States, making lapsed and void devises fall into the residue, apply only to cases of lapse, not to contingent charges, that never become vested.

¹ *Arnold v. Chapman*, 1 Ves. Sen. 108.

² See *Lyman v. Vanderspiegel*, 1 Aikens, Vt. 275, 280.

³ 19 Ves. 363.

⁴ *Cruise v. Barley*, 3 P. W. 20.

⁵ 1 Vict. c. 26, § 25.

⁶ *Ut sup.*

The acts referred to provide against a lapse of an estate tail, or of an interest given to a child who has a child living at testator's decease. Jarman thinks¹ that the 1 Vict. c. 26, does not apply to bequests to children as a class. But the plain words of section 32 seem to imply the contrary. Children taking under such a section appear to be in by descent, not by purchase. A similar inference seems to apply to the analogous acts in the United States.

According to the old rules of chancery, all gifts by will lapse, if the donees die in the lifetime of the testator. But, if any of the issue of the legatee be living when the testator dies,² there is no lapse in any of the following States: Pennsylvania, South Carolina, Virginia, Maryland, Massachusetts, Connecticut, Vermont, New Jersey, Mississippi, Maine, or Rhode Island.³

In Maryland there is the salutary law that there never is a lapse.⁴ The provision contained in New York Revised Statutes,⁵ however, applies only to bequests to children, or lineal descendants of the testator,⁶ but the section applies to past wills, if the testator survived the period of the passing of the Revised Statutes.⁷

An intestacy was considered to occur in *Nightingale v. Sheldon*⁸ under the following circumstances:—A. devised all his estate to his wife for life; if she died before his son I. arrived of age, then to his daughter A. until I. came of age; at that time the estate to be equally divided among his three children in fee, or to the survivors of them if either should die without issue, and if all his children should die without issue, and neither

¹ Vol. I, 313.

² Prince's Dig. 256.

³ 4 Kent, 542; note, 526; see Redfield on Wills, Vol. II, 174.

⁴ 4 Kent, 526.

⁵ Vol. II, 66, § 52.

⁶ *Armstrong v. Moran*, 1 Bradf. 314. ⁷ *Bishop v. Bishop*, 4 Hill, 138.

⁸ 5 Mas. 336.

should survive him, then to her in fee. All the children died in the lifetime of the wife, but two of them left issue who survived her. It was held that owing to the doubt of the testator's intentions, and from the omission to provide for the event which happened, an intestacy was the result. Yet the issue appear to have taken implied estates tail by purchase under the clause, "If either of them should die without issue."

The doctrine in *Maybank v. Brooks*,¹ that a gift to A., his executors, administrators, or assigns, may lapse, has prevailed, even though the fact that the legatee was dead at the time of making the will was known to the testator. But, this rule would hardly be followed in America.

Where there is a gift to several, not as a class or as joint tenants, but by name or as tenants in common, the gift to each is specific, and, on a lapse, falls to the heir.² In *Jackson v. Roberts*,³ it was held that there is no lapse in the United States of a gift in joint tenancy or even in a tenancy in common, if given to a class.

In *Downing v. Marshall*,⁴ the devise was to A. for life, and to his heirs, if he dies leaving issue, but if he dies without issue, then over to the testator's nephews and nieces. Though A. died in the lifetime of the testator, yet the remainder to the nephews and nieces did not lapse, as it was intended to be independent of the time when A. died. But where the devise was that the executors should apply the property to such charitable uses as they should think best on the death of the wife, this gift was held to lapse by the death of the wife in the testator's lifetime.⁵

¹ 1 Br. C. C. 84; see 1 Roper on Legacies, 467.

² *Hyatt v. Paysley*, 23 Barb. 285.

³ 14 Gray, 546.

⁴ 23 N. Y. 366.

⁵ *Fontain v. Ravenel*, 17 How. U. S. 369.

In *Green v. Dennis*,¹ the heir was preferred to a residuary devisee as to a void devise. This case, therefore, is opposed to the common notion that there is any difference between lapsed and void devises as to the rights of the residuary devisee. Yet the residuary devisee attracted a contingent interest which failed in *Hayden v. Stoughton*.² The law, therefore, on this point varies in the different States, and perhaps is not yet quite settled in any. Lapsed legacies fall into the residue. Lapsed devises do not, because they are specific—they fall to the heir. In those States where all wills speak only from the death of the testator, it is doubtful whether the old doctrine of lapse will be still applied or not. Every devise of land, however, is specific, so that the old rule would still seem to apply, especially as land is only a secondary fund to the general creditors. This appears to be the opinion in England, though not in the United States.³

Construction has given to residuary devises, in some States, the effect of including lapsed and void devises.⁴ But, in most States, if several devisees take not as joint tenants, but as tenants in common, a lapse of the share of any of them predeceasing the testator occurs for the benefit of the heir. The lapse of a particular interest, however, does not affect ulterior limitations.⁵

If A. bequeaths his property according to the uses of B.'s will, and B.'s devisees die after the death of B., but before the death of A., there is a lapse.⁶ This decision,

¹ 1 Conn. 292; see *Tongue v. Nutwell*, 13 Md. 415; see *Van Kleeck v. Refd. Dutch Ch.* 6 Paige, 600.

² 5 Pick. 528.

³ *Prescott v. Prescott*, 7 Met. 146; see *Van Kleeck v. Dutch Church*, 20 Wend. 499; *supra*, c. 24, § 4.

⁴ *Graighead v. Given*, 10 Serg. & R. 351.

⁵ *West v. Williams*, 15 Ark. 682.

⁶ *Colsha v. Cheese*, 7 Hare, 286.

however, seems to be contrary to principle. For as B.'s will is incorporated by reference in A.'s, the will of A. speaks expressly not from its date nor from A.'s death, but according to the context of B.'s will and its date of operation, which is the date of B.'s death. The principle, indeed, of the decision in *Maybank v. Brooks*,¹ tends to support the ruling in *Colsha v. Cheese*.

A testator is not presumed to provide for a case of lapse, in the absence of any express or implied statement to this effect. Accordingly, a mere legacy to a debtor of the amount of the debt, may lapse, and is not a remission of the debt. But it cancels the debt, whether the creditor survives the testator or not,² if there are words used not only of bequeathing or giving, but of forgiving or remitting.³ The intention relates then to a present, not a future favor, although revocable in either case. If the testator directs his executor to deliver up the security, the legacy will not be subject to lapse.⁴ A general provision for creditors seems intended expressly not to lapse.⁵ Where property is given to A. if he survive testator, and both are drowned together at sea, the next of kin of the testator, and not of A., will take, if they fail to adduce any evidence of A.'s survivorship,⁶ as the burden of the proof of survivorship is on them. In France, the presumption of survivorship in such cases is regulated by express enactment. Although, if a person named devisee is dead at the time of making the will, this, as a rule, causes a

¹ 1 Br. C. C. 84.

² *Sibthorp v. Moxton*, 1 Ves. Sen. 49; *South v. Williams*, 12 Sim. 566; see *Roper on Legacies*, 470-7.

³ *Elliott v. Davenport*, 1 P. Wms. 83.

⁴ *Sibthorp v. Moxton*, 1 Ves. Sen. 49.

⁵ *Philips v. Phillips*, 3 Hare, 281.

⁶ *Underwood v. Wing*, 19 Beav. 459.

lapse; yet, if the devise is to one or his heirs, or even to one and his heirs, the word heirs may, on the context, be held to be substitutional.¹ However, if standing alone, it will be deemed merely a word of limitation.² On the lapse of a devise for life, any remainder or executory gift, if vested in interest, becomes vested in possession on the testator's death.³

The term lapse is sometimes used in the United States as synonymous with failure. In England, the term is confined to denote only the particular kind of failure caused by the beneficiary dying before the testator.

In *Whitehead v. Lassiter*,⁴ under a bequest to testator's widow for life, remainder to the testator's children "now living," the children of a son who predeceased the testator were held to take. Judge Redfield⁵ seems to think that this was properly a case of lapse. The words now living, indeed, do not give vested estates at once to the persons so designated. As to them the will operates, according to the scriptural rule, only from the death of the testator. Yet, the decision referred to is an error in the right direction. The next case referred to by the judge—*Bond's Appeal*—would seem to be still more open to the objection put by the judge, but that the word heirs in America is readily construed as a word of purchase.

Latterly, under a gift to one for life,⁶ and after his death to his children or his heirs, the word "or" is construed literally, so as to render the subsequent gift

¹ *Davis v. Taul*, 6 Dana, 51.

² *Dickenson v. Purvis*, 8 S. & R. 71.

³ *West v. Williams*, 15 Aik. 682; *Martha May's Appeal*, 41 Penn. St. 512.

⁴ 4 Jones Eq. 79.

⁵ Vol. II, 66.

⁶ *Vanordall v. Van Derventer*, 51 Barb. 137; 1 Denio, 168; 18 N. Y. 418.

substitutional in case of the lapse of the first.¹ Such, indeed, is obviously the natural meaning of the word "or" in most limitations of the kind referred to. However, the courts do not studiously strain against a construction which is defeated by lapse, although they favor the vesting of interests. The distinction is between general rules of construction, and the moulding of these rules by the event. This is never done. Lapse, therefore, never affects construction.

¹ *Finlason v. Tatlock*, 18 W. R. 332.

CHAPTER XXVII.

SUGGESTIONS TO TESTAMENTARY DRAFTSMEN.

Questions of construction range themselves into one of three classes, according as the difficulty relates to the words of direction, the gift, or the beneficiary. A very accurate description of the subject or object of gift is sometimes not in the power of the testator. But he never can have any adequate excuse for using a merely precatory term. Such phraseology should be carefully avoided by him. He should speak with no uncertain sound of desire or suggestion, but should use the words "will," "give," "devise," or "bequeath," or all or several of these terms together. Unless the will is thus explicit, and the trusts plainly appear to be imperative, they may be construed, at the present day, as resting in the discretion of the trustee. At all events, a will that is doubtful in this respect is certain to be litigated in the present supposed shifting state of the authorities, both here and in England, respecting the phraseology necessary to create a precatory trust or trust-power. If the testator really wishes to give a trustee a discretion, there is no reason of law or precedence why he should not do so. Only he should then state explicitly that the trust is discretionary, and not imperative.

An uncertainty, too, in the words of disposition or in any abstract phrase, such as "property," "effects," &c., is usually much more serious than where the inaccuracy relates to a concrete subject or object of gift; because ambiguities of the latter kind are open to

parol evidence. But no abstract word can be thus explained.

The remarks I have suggested respecting the use of disposing terms are also applicable to the other two sources of difficulty—the subject and object of gift.¹ No general rules can dispense with the necessity for great care and attention on the part of the draftsman in respect to each element of the testamentary gift. He should, if possible, leave nothing in doubt. Indeed, each rule of testamentary construction or equitable presumption merely denotes a common class of difficulties, which the courts can repress only by the most rigid fetters. Therefore, all doubt should be precluded as to the parcels or property, whether real or personal, which the testator intended to convey: nor should room be left for litigation upon any one of the points discussed in the preceding chapters.

Where the draftsman has time to elaborate the instrument, he should consult a treatise on wills as to the points most fruitful of litigation in the particular matters he is considering. A reference to the index or table of contents, and, at all events, a very short survey of the text of any of the leading treatises, will give him the necessary information. General rules and celebrated cases are lights and buoys that are only placed near the quicksands where testamentary wrecks are most frequent. A reference to the chart of past accidents is, however, the best means of avoiding disaster in the future.

The testamentary draftsman should be cautious in his use of technical terms, especially if the testator is likely to survive for any considerable time; otherwise, any subsequent change of the will may greatly confuse the preceding limitations, and change terms of purchase into words of limitation, or conversely.

¹ *Supra*, c. xvii, § 2.

The quantity of estate, and the nature of the donee's interest—whether it be legal or equitable, for years, life, in tail, or fee, and whether it be by purchase or limitation—should also be left free from doubt.

The subject of gift, if specific, should be accurately indicated and carefully defined by exact description.¹ If the whole of the fund or property be given, this should be clearly expressed.² A reference to the deed under which land was conveyed to the testator or his ancestor is perhaps the best mode of describing an estate, as, for instance: "I devise my estate at Appleton, in as full and ample a manner as it was conveyed to me by a deed bearing date, &c., and made between," &c. The description in the deed will, by this reference, be incorporated with the will. A reference to occupancy alone is, of course, too precarious, as tenants are often changed. Such allusions, too, are generally incomplete. If a reference of this kind is made, care should be taken to state whether the alleged occupants have in their possession all the devised premises or not.

The rents and income of the testator's property should be expressly disposed of, in case any of the gifts is limited on a contingency which will postpone vesting.

A testator should distinctly declare whether he intends each devise or bequest to be construed with reference to the date of his will, or of his decease.

Where the gift is not of "all goods and effects," the subjects of the special donation should be copiously and accurately enumerated, and nothing should be left to legal inference with respect to the nature of the gift,—whether it be specific, demonstrative, or general, or how it is to be affected by ademption, enhancement, or other probable change in the testator's circumstances before his death.

¹ *Supra*, c. xxiv, § 2.

² *Supra*, Part I, 106, 163, *et seq.*

Where a gift of "furniture," "household effects," "farming stores," or of any other personal estate, at a particular place, is intended to be general, the testator should add negative words, thus: "I give all my personal estate at A. to B., and this gift is subject to no exception whatever."

Negative words are still more necessary where the subject of a bequest is intended to be exonerated, for the benefit of the legatee, from some charge affecting it.¹ A primary fund for payment of debts should, therefore, be accompanied with negative words, exonerating the general personalty, when such is the testator's intention. Especial care should be given to this point, and where land is subject to a mortgage or other charge, the devisee's rights in respect to exoneration should be most plainly expressed in both affirmative and negative terms. Devising land "subject to a mortgage" will still, in most of the United States, but not in England, entitle the devisee to exoneration out of the testator's general personalty. In proportion as the rule of construction is strong and technical, and approaches the nature of a rule of law, such as the doctrine referred to, or as the rule in Shelley's case is in England, care should be taken to preclude the application of the doctrine, if the devise is intended not to be subject to its influence.

The donee should be identified by unmistakable terms. If the testator has a doubt whether his knowledge of the donee's person and description is accurate, he should be copious on this head, as the more marks he assigns, the more easily will identification be made, unless—which is very improbable—he is wholly unacquainted with the person and circumstances of the object of his bounty.²

Where the testator is leaving a young widow, she

¹ *Supra*, 239.

² *Supra*, Part I, 167.

ought to get but little discretionary power as to the estate. She ought not, however, to be subjected to any restrictions against marriage. Any discretion given her should be exercisable only by will. This would prevent the children, if their shares are made subject to her appointment, from hastily disposing of their property, and, on the other hand, would prevent the mother from showing any undue partiality to such of her children as might combine with her to defeat the rights of their brethren. This is perhaps an improbable contingency, but it should not be ignored.

Gifts for the separate use of a married woman should be carefully worded, so as to exclude marital rights and anticipation, and to confer a power to appoint only by will, if any apprehension is entertained of encroachments on the part of the husband.

The widow or trustees should have the power of advancing a certain proportion of the bequests to the children, for their education, and even for trading purposes, after the children reached eighteen.

No ambiguity should be apparent in the will as to when the shares of children vest¹—whether their descendants are to take substitutional gifts, in case of lapse or other failure of the children's shares—what failure of issue is contemplated—whether a condition is precedent or subsequent—what is to be the devolution of the property, if the beneficiaries do not survive in the order primarily expected—and to what period the reference to survivorship applies. If the personalty is intended to devolve in strict settlement, the non-vesting clause should be inserted, so that on the death of any child under age, and without issue, his share should go to the next in remainder under the will, and not to his next of kin.²

¹ *Supra*, c. xxiii, §§ 1, 4.

² *Supra*, c. xi.

Gifts to a class, or the survivors of a class, with or without cross-remainders, should also be carefully expressed, so as to denote the particular objects the testator had in view, and, as in the case of children, whether they are to be those who survive himself, the tenant for life, or other members of the class,¹ and whether the issue (if any) of deceased members of the class are to stand in the place of their ancestors under the limitation.

Provision should also be made for future children of the testator, or of any such of his donees, if they are objects of the testator's bounty, unless their ancestor takes a precedent life interest in the property given to them.

Every circumstance likely to occur that may either revoke or materially affect the construction, such as marriage or the birth of a child, should be considered by the testator.²

Codicils should plainly indicate how far the will was intended to be revoked or modified.

Nothing should be left in doubt as to whether devisees take as joint tenants,³ or in common, or in common for life with remainder to the survivor.⁴

The testator himself should be personally consulted before the instructions given to the counsellor-at-law are embodied in the final instrument.

It is hardly necessary to add that, besides expressing the special will of the testator, free and clear of all manner of doubt, the draftsman should take care not to violate any rule of law, but to inform the testator of the extent to which alone his wishes can be carried, when these tend to contravene any principle of public policy, rule of law, or any doctrine, that is not a mere rule of construction or administration.

¹ *Supra*, c. xvi, § 3.

² c. i, § 3.

³ c. ix.

⁴ c. xvi, § 1.



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